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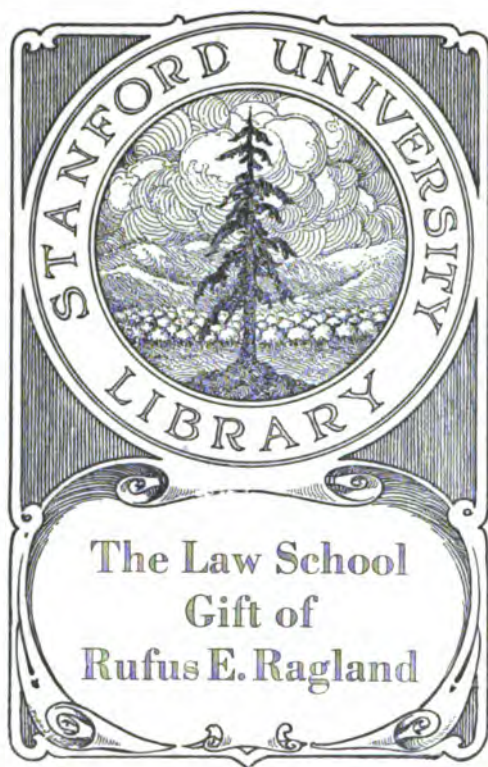
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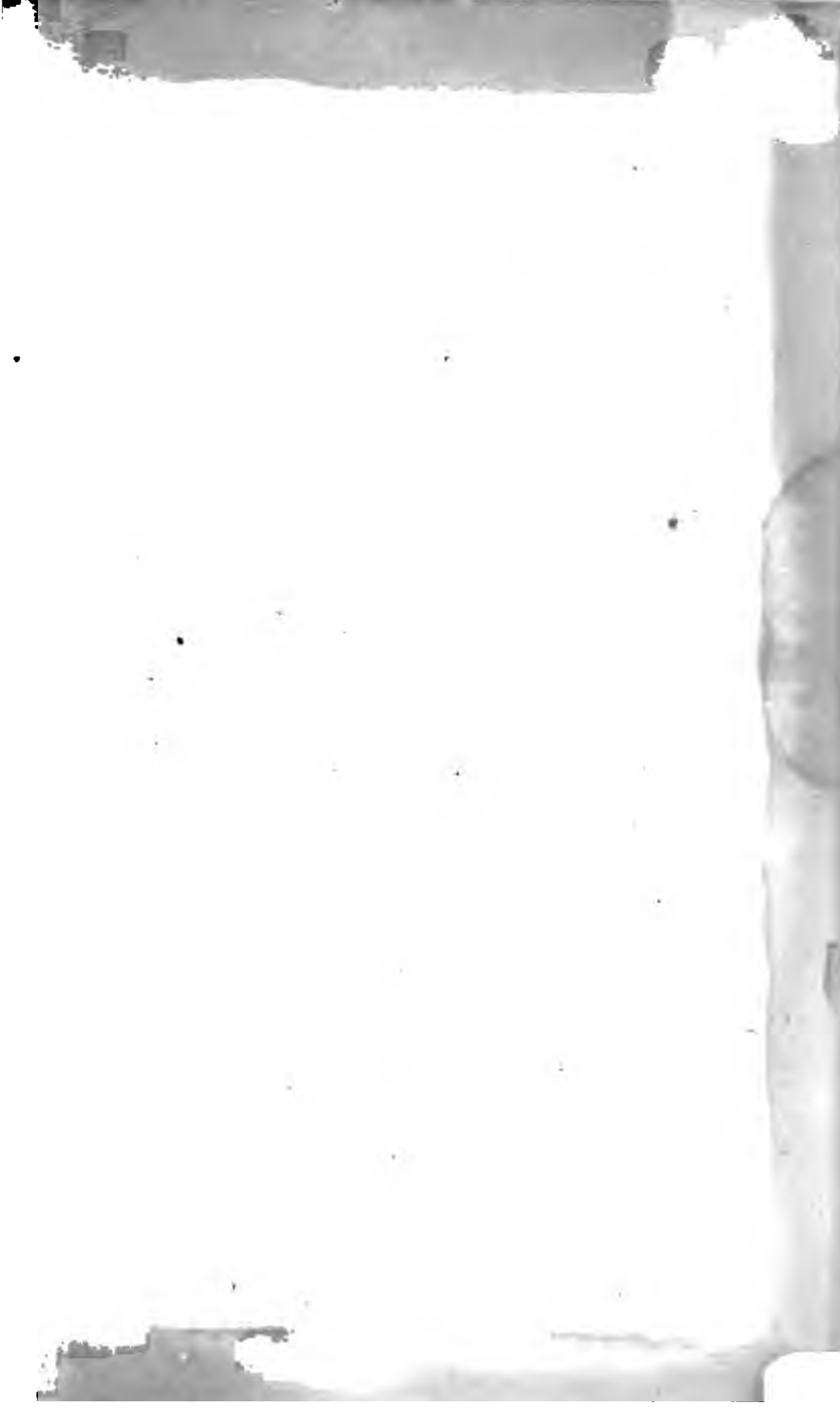
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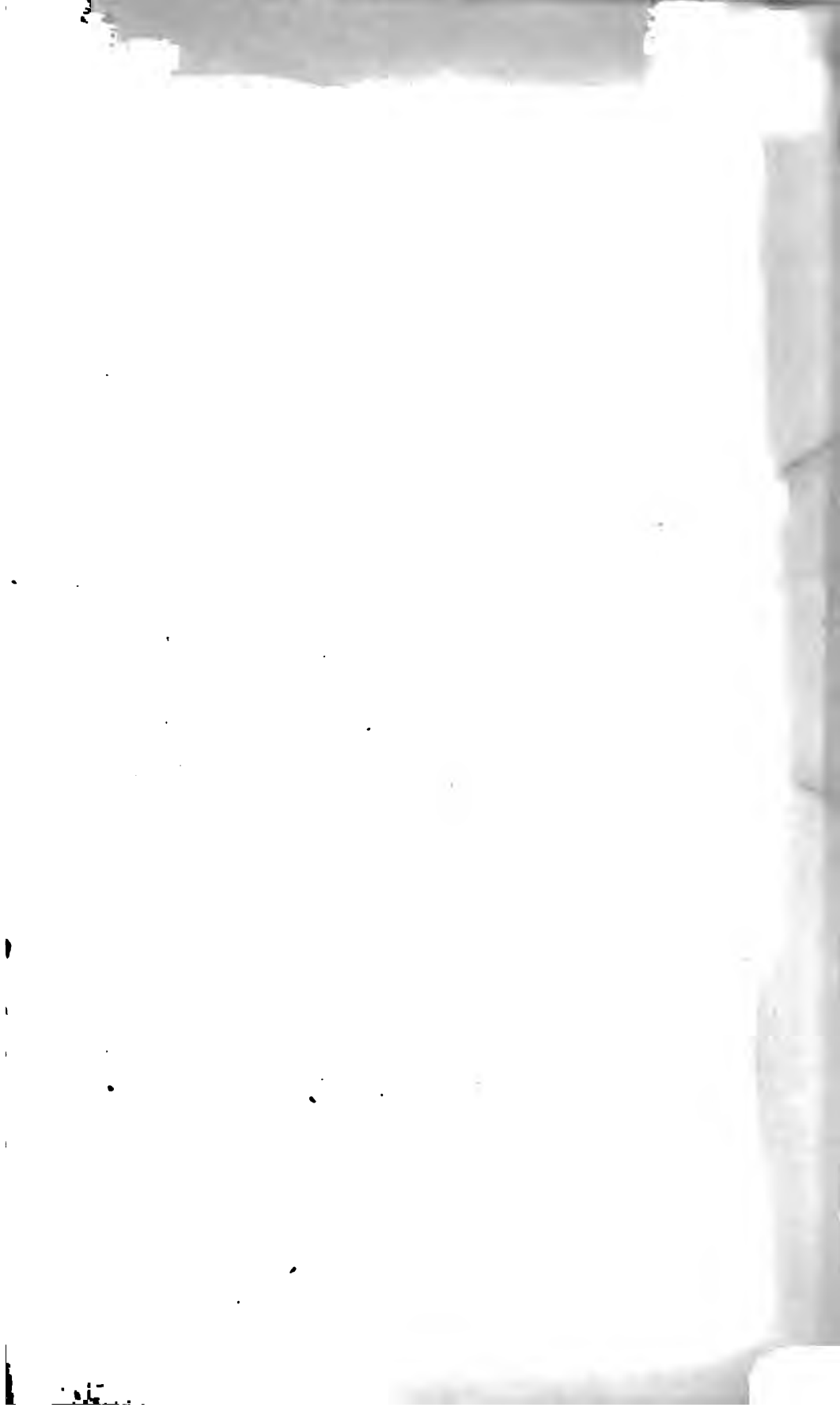
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IN LAW AND EQUITY:

CONTAINING REPORTS OF CASES IN THE

House of Lords, Privy Council,

COURTS OF EQUITY AND COMMON LAW;

AND IN THE

Admiralty and Ecclesiastical Courts;

INCLUDING ALSO

CASES IN BANKRUPTCY AND CROWN CASES RESERVED.

EDITED BY

EDMUND H. BENNETT & CHAUNCEY SMITH, ESQRS.,

COUNSELLORS AT LAW.

VOLUME IV.

**Containing Cases in all the Courts of Equity and Common Law, and in the
High Court of Admiralty, during the year 1851.**

STANFORD

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LITTLE, BROWN AND COMPANY.

1851.

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A

T A B L E

OF THE

ONE HUNDRED AND FIFTY-FOUR CASES

CONTAINED IN

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CASES

ARGUED AND DETERMINED

IN THE SEVERAL

COURTS OF CHANCERY;

FROM AND AFTER MICH. TERM, 14 VICT., A. D. 1850.

STUART v. LLOYD.¹

December 21, 1850, and January 11, 1851.

Practice — Amendments — 68th General Order of May, 1845.

The affidavits in support of the plaintiff's motion for leave to amend his bill under the 68th general order of May, 1845, must not be affidavits of opinion merely, as to the materiality of the proposed amendments, and as to due diligence having been used, but the affidavits must also state circumstances from which the court itself may draw its own conclusion upon those matters.

THIS was a motion by the defendant, that an order made by Lord Cranworth, V. C., dated the 14th of December, 1850, whereby it was ordered that the time limited by an order of his lordship, dated the 7th of December, 1850, for filing a replication in this cause, should be further enlarged, and that the plaintiff should be at liberty to amend his bill in this cause, as he should be advised, within one week from the date of such order, might be reversed, or varied in such manner as should seem meet. The object of the suit was to establish the rights of a partner in a partnership which the plaintiff alleged had subsisted between him and one Foster, deceased, of whom the defendant, Lloyd, was surviving executor. On the 9th of November, 1849, the bill was filed, and on the 24th of May, 1850, the answer was put in, denying the partnership *in toto*. On the 29th of June the plaintiff gave notice of motion to inspect documents admitted by the answer to be in the defendant's possession, and on the 9th of July, an order was made for production; but it appeared from the affidavits, that the documents were not inspected on behalf of the plaintiff until the 30th of July. On the 5th of July the answer became sufficient, and on the following day the plaintiff filed exceptions to the answer for impertinence. These exceptions were allowed by the master. On the 2d of August the time for obtaining an order of course to amend, under the 32d article of the 16th general

¹ 15 Jur. 411.

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order of May, 1845, expired, and no order was obtained. The defendant might, immediately after the expiration of the 2d of August, have moved, under the 37th article of that general order, to dismiss the bill for want of prosecution; but he did not move to that effect until the Michaelmas term following, when the motion was opposed by the plaintiff, on the ground that the documents which had been ordered to be inspected were so multitudinous that the delay in the prosecution of the suit was absolutely unavoidable; but the court ordered (December 7, 1850) that the plaintiff should file a replication within a week, or that the bill should be dismissed. On the 9th of December the plaintiff gave notice of a motion for the 12th, that the time for filing the replication, under the order of the 7th of December, might be enlarged, and that the plaintiff might be at liberty to amend his bill. In support of this motion there was the affidavit of the plaintiff and his solicitor, which was in the following form: "That we have been advised by counsel that it is necessary for the interest of the above-named plaintiff in this cause, that the bill filed in this cause against the above-named defendant should be amended; that the draft of the proposed amendment has been settled, approved, and signed by counsel, and that such amendment is not intended for delay or vexation, but because the same is considered to be material to the interest of the said plaintiff; that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into such bill." Lord Cranworth, V. C., granted the motion, and made an order in the terms above stated, and now appealed from.

Wood and T. J. Phillips, in support of the appeal, contended that this mere skeleton affidavit was not such an affidavit as was contemplated by the 68th general order of May, 1845, but only such as was spoken of in the 67th of those orders; that it was quite clear, upon comparing those two orders, that a great distinction was intended, and that in the first of those orders it was intended that a mere affidavit of opinion, as to the *materiality* of the proposed amendments, was to be sufficient, but that by the 68th it was intended that the affidavit should *show the materiality* of the proposed amendments, and that due diligence had been used; that, in the present case, the affidavit was a mere affidavit of opinion as to the *materiality*, not *showing* what the proposed amendments are, and, therefore, rendering it quite impossible for the court to form any opinion whether the amendments arose out of the inspection of documents, which would necessarily be the most important question in considering "whether the amendments could not, with reasonable diligence, have been sooner introduced into the bill." [They relied on the following cases: *The Attorney General v. The Fishmongers' Company*, 4 My. & C. 1. *Christ's Hospital v. Grainger*, 1 Ph. 634. *Winnell v. Featherstonehaugh*, 9 Jur. 1054. 10 Jur. 235. *Phillips v. Goding*, 1 Hare, 40.]

Rolt and Bazalgette, contra. We submit that this affidavit is sufficient until it is challenged by a contrary affidavit. The other

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side say that the court do not deal with affidavits of opinion except upon *ex parte* applications, but this is a mistake. The 68th order does not require you to state what the amendments are; and why? Because it is the practice of the court for the junior counsel to produce, on the motion, the amendments settled, and thus to import into the case what the amendments are. It is clear from the 69th general order of May, 1845, taken with the two preceding orders, that the *opinion* of the solicitor for the plaintiff as to the *materiality* of the proposed amendments is to be stated in the affidavit; but it would have been absurd to require the facts showing the *materiality*, and also the solicitor's opinion as to the effect of those facts. The cases relied on by the other side were either cases under the old orders, or cases in which the solicitor did not swear, *simpliciter*, that due diligence had been used, and that the amendments were material, but asked the court to infer that due diligence had been used, and that the amendments were material. [They stated, that as to the *materiality* of the amendments, it had been the usual practice in the masters' office to be satisfied with an affidavit in the present form, unless it was met by a counter affidavit.]

LORD CHANCELLOR. Were I called upon, in this case, to review the judgment of the vice-chancellor upon matters of fact, I should require a very strong case to be made out to induce me to overrule that opinion, as I think that the *better course* is to rest satisfied with the opinion of one judge upon such matters. But this is a very different question, and is one simply as to the construction of the general order, which makes it a very important motion; for it is of the greatest consequence that general uniformity of practice should be observed, and not be subject to modifications of opinions. I understand, on the one side, that some of the masters require, in like cases to the present, an affidavit according to the construction contended for by the appellant; and, on the other hand, that other masters pursue a contrary practice, but I cannot find that such contrary practice has ever received the sanction of this court; and I understand that this is the first time that this question has come before this court. Now, it strikes me, that all general orders and acts of Parliament, the object of which is to prevent delay, ought to be strictly construed, in the sense of taking care that such object is not defeated, and not left open to such doubtful applications as to make the rule of little value. These orders have been framed substantially to expedite suits in chancery; and it is properly said, that the 68th of these orders applies to the present case, and that the 67th is to be incorporated into it, as it were, previous to the word "further." The 68th order states, "that after the plaintiff has filed, or undertaken to file, a replication, or after the expiration of four weeks from the time when the answer or last answer is deemed sufficient, a special order for leave to amend a bill is not to be granted without further affidavit, showing that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into such bill." Now, I do not think that it is correct to consider this case, beginning with the dates of July and

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August. I have no affidavit to show that the amendments arose out of matters stated or referred to in the answer; I know neither what the amendments are, nor the materiality of them. I find an answer put in in May to a bill filed in November. What has the plaintiff done from May till December? There is an entire absence of information accounting for this great delay, although length of time in these cases is always of importance; but I am asked to look at certain proceedings in the cause, relative to some impertinence, as accounting for the delay. This is not an answer to the objection of want of due diligence in the suit; the mere attending to some impertinent matter in an answer does not satisfy the requisition of due diligence. But, then, what is the true construction of this 68th order? It is very carefully framed, and the expressions would not have been varied from those in the old order unless it had been intended to introduce a new practice; nothing could have been more dangerous. Now, the substance of the old order on this matter was, that the court should be *satisfied* as to the materiality of the proposed amendments, and on the subject of due diligence. The present order is, that these matters should be *shown* to the court. I cannot understand that that is *shown* to the court which is merely alleged as a fact in a general affidavit. The intention of the order is, that the delay should be accounted for. How can it be said to be *shown*, because a man merely swears, that, according to his opinion, the amendments are material, and that due diligence has been used? My opinion is, that this form of affidavit does not satisfy the requisitions of the 68th order, and that a party is not entitled to indulgence under it without setting forth such matters as will satisfy the party, whoever that may be, to whom the application is made, both that the proposed amendments are material, and that they could not with due diligence have been sooner introduced into the bill. It is said that this construction imposes a great burden upon the plaintiff. I do not go along with that argument. As the case is at present presented to me, it rests on mere surmise, that the question is one of partnership or no partnership. I do not think that it is necessary to set out in the affidavit formally the substance of the pleadings, but that it would be sufficient to say that the bill was filed to establish the fact of a partnership, &c., and that the defendant denies the partnership, but that he has referred in his answer to certain documents; that the plaintiff considers it necessary to amend his bill in certain particulars, &c. If, indeed, this statement should require to be of considerable length, I cannot on that account adopt a different construction. My construction of the order is, that circumstances must be *shown* to prove the materiality of the proposed amendments, and also to due diligence; and as to the latter, the plaintiff and his solicitor, or in some cases the solicitor alone, must swear that he has used due diligence. That, of course, must be a matter of opinion, but the court is not to be satisfied with that mere affidavit of opinion, but the further affidavit must set forth what has been actually done, to enable the court to draw its own conclusion. In proceedings analogous to this at law, where the plaintiff has not gone to trial, and a nonsuit ensues, the

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plaintiff may move *nisi* to set aside the nonsuit, but he must state some good reasons why he did not go to trial; but the court invariably makes the rule absolute, upon the motion to dissolve the rule *nisi*, unless the affidavits very satisfactorily account for the delay. That seems quite analogous to the present case, except that here the ground for the indulgence must be shown in the first instance; a contrary practice might lead to much perjury. I am of opinion that the order of the court below must be discharged, the plaintiff to have a week to file his replication, the amendments to be expunged.

Ordered accordingly.

THE ATTORNEY GENERAL v. DALTON.¹

March 18, 1850.

Charity — Appointment of Trustees — Legal Estate of Charity Property — In whom vested.

Appointment of trustees of a charity for the benefit of the poor of a parish, held to be illegal and void where the deed creating the charity did not prescribe any particular mode of appointing new trustees; but it appeared that the estate belonging to the charity was bought with the parish money, and that the parishioners had been accustomed, for many years after the institution of the charity, to exercise a control over its affairs, in the election of trustees and otherwise, but that the trustees in question had been elected and nominated by the survivors of former trustees without the intervention of the parishioners, and under a mode of proceeding of comparatively modern date.

The legal estate of charity property, under particular circumstances, presumed to be vested in the existing trustees.

THIS information was filed by the attorney general, at the relation of certain of the parishioners of the parish of St. Mary, Lambeth, to have new trustees appointed of a charity called "Hayle's Charity," and a scheme settled for the future management of the charity. The defendants were the rector and church-wardens of the parish, the district church-wardens and the incumbents of such districts, and the parties claiming to be the present trustees of the charity. The principal question was, whether the appointment of trustees of the charity was vested in the parishioners in vestry assembled, or in the trustees themselves, or a certain number of the survivors of them. The present trustees, the validity of whose appointment was impugned by the information, were not appointed by the parishioners, but by a certain number of their own body, being the survivors of the trustees last appointed. The property was about to become very valuable by the falling in of some leases, and it was a question of some consequence to the parishioners as to who should have the appointment of trustees. The circumstances under which the charity was founded were as follows: By deed, under the hand and seal of one Robert Hayle, dated the 1st of December, 1671, it was witnessed, that the said Robert Hayle had received of Thomas Tompkins and fifteen

¹ 15 Jur. 412.

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other persons therein named, who were the parties of the second part to the indenture next hereinafter stated, the sum of 300*l.*, being the consideration money for the purchase of the fee simple and inheritance of a piece of ground lying in the common fields, called "St. George's Fields," in the parish of St. George the Martyr, in Southwark, in the county of Surrey, lately purchased by them of the said Robert Hayle and Anne his wife, and mentioned in an indenture bearing even date with the said now stating deed, and made between the said Robert Hayle and Anne his wife, of the one part, and the said Thomas Tompkins and the said fifteen other persons, of the other part.

By this indenture, they, the said Robert Hayle and Anne his wife, in consideration of 300*l.* paid by the parties of the other part, and for other good causes and considerations, did grant, bargain, sell, alien, enfeoff, and confirm unto the said Thomas Tompkins and the said fifteen other parties of the other part, their heirs and successors forever, all that piece or parcel of ground lying and being in the common fields, and commonly called "St. George's Fields," in the parish of St. George the Martyr, in Southwark, in the county of Surrey, commonly called "The Six Acres," containing, by estimation, six acres, be it more or less, with the appurtenances, to hold the same unto and to the use of the said several parties of the second part, their heirs and assigns forever. By indenture of release, dated the 11th of January, 1700, grounded on an indenture of lease, and made between Henry Forty the elder and William Phillips of the one part, and the several persons therein named of the other part, being the rector and three church-wardens of the parish church of Lambeth, and twelve parishioners of the said parish, after reciting that the said Thomas Tompkins and the other persons to whom the conveyance in 1671 was made, by another indenture, dated the 1st of December, 1671, declared and acknowledged that the said conveyance, and all other assurances to them made of the said premises, were so to them made, and that they did by virtue thereof stand seized of the said premises, upon trust and confidence that, among other things, they and their heirs, or some of them, should manage, dispose of, and pay the rents, issues, and profits of the said premises to the rector and church-wardens, for the time being, of the said parish of Lambeth, to be from time to time disposed of for the relief of the poor inhabitants of the said parish, as the rector and church-wardens for the time being should think fit; and that whenever all the said trustees, except the number of five, should happen to die, the said five persons should convey and assure the said premises, with their appurtenances, to the use of themselves and eleven other parishioners and inhabitants of the parish, whereof the rector and church-wardens for the time being were to be four, upon the same trusts as thereinbefore and after declared; and reciting that the said Henry Forty and William Phillips were the only survivors of the several trustees mentioned in the indenture of 1671; it was witnessed, that for the nominal consideration therein mentioned, and in pursuance of the recited indenture of 1671, and the trusts thereby in them reposed, and the directions thereby

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given, the said Henry Forty and William Phillips did bargain, sell, alien, release, and confirm, unto the parties thereto of the second part, the premises in question, upon trust from time to time to manage, dispose of, and pay the rents, issues, and profits thereof unto the rector and church-wardens for the time being of the parish of Lambeth, or to some or one of them, to be by them from time to time disposed of to or for the relief and benefit of the poor inhabitants of the said parish, as the rector and church-wardens for the time being of the said parish should think fit and judge convenient; and upon this further trust and confidence, that whensoever all the trustees thereinbefore named, and parties thereto, except five, should happen to die, they, such five, should convey the premises to the use of themselves and eleven others, parishioners and inhabitants of the parish, of whom the rector and church-wardens for the time being should be four, upon the same trusts as were thereinbefore expressed and declared. The declaration of trust recited in the last-stated indenture was lost, and the only record of it was to be found in the recital above mentioned. It was alleged in the information, that the land in question was purchased out of the funds of the parish, and that the parishioners in vestry assembled for many years exercised a control over the management of the property and the appointment of trustees; and as evidence on these points, various entries in the parish books were stated, and leases granted of the property were set forth, from which it appeared that the property was purchased with parish money, and that the parishioners had exercised a direct control over the property. Under date the 23d of June, 1725, there was an entry of the proceedings of the parishioners in vestry assembled, in which it was stated that it was agreed that ten persons therein named, together with the rector and church-wardens for the time being of the parish, should be appointed trustees with the then present trustees of the estates therein named, and, amongst others, the estate purchased by the parish in St. George's Fields, and that any five of them, with a church-warden, should be a committee, and have full power to let leases or otherwise of the said estates for the best advantage of the parish. There were other entries, showing control exercised over the property by the parishioners in the years 1742, 1753, 1763, and 1768; and in February, 1769, it being necessary to borrow a sum for parish purposes, the parishioners in vestry assembled adopted the report of a committee appointed for the purpose, in which they recommended money to be raised by annuities, to be charged on, amongst other property, Hayle's estate in St. George's Fields. In 1769 new trustees were appointed, and, by an indenture, dated the 10th of June, 1769, between James Theobald, therein described as the only son and heir of James Theobald, Esq., deceased, who was the eldest son and heir, and one of the devisees named in the last will of Peter Theobald the elder deceased, and Peter Theobald, one other of the sons and devisees of Peter Theobald the elder, of the one part; and the Rev. Beilby Porteus, D. D., rector of the parish, and three church-wardens and thirteen other persons, inhabitants of the parish, of the other part; after reciting the indenture of the 1st of December, 1671, and the indenture of

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the 11th of January, 1700, and that of the grantees or trustees named in the indenture of the 11th of January, 1700, were then dead, and that the said Peter Theobald was the survivor, and that he devised all his real estates to his sons, the said Thomas Theobald, deceased, and Peter Theobald, parties thereto, and their heirs, and that the parishioners and inhabitants of the parish of Lambeth, in vestry assembled, had elected and chosen the several persons parties of the second part to be trustees of the property; it was witnessed, that for the conveying of the legal estate in the said property to the parties of the second part, the said James and Peter Theobald conveyed the same unto and to the use of the said parties of the second part, their heirs and assigns, upon trust that they, the said seventeen persons, and the survivor of them, should, from time to time, manage and dispose of, and pay the rents, fines, and profits of or arising from the property to the rector and church-wardens for the time being, to be by them disposed of to and for the relief and benefit of the poor inhabitants of the said parish, as the rector and church-wardens should think fit and judge convenient; and the indenture contained a declaration, that when and as often as the trustees, parties thereto, by death or removal, or refusal to act, should be reduced to five, or less, then the remaining trustees should, with all convenient speed, convey the property unto such other persons whom the major part of them should nominate, but so that the rector and church-wardens should be of the number, and constantly succeed, to the use of the remaining trustees and such other new trustees, to be appointed as aforesaid, and of their heirs and assigns, upon the trusts declared concerning the same, and so from time to time as often as the then present or any other succeeding trustees should be reduced to the number of five, to the intent that the same trust might have continuance forever. The information charged, that the provision in this deed for the appointment of new trustees was wholly unwarranted, and of no effect.

It appeared from the minutes of the proceedings of the vestry, that a meeting was convened on the 6th of August, 1782, to fill up the vacancies of trustees of Hayle's charity; and that a committee, appointed for superintending the parish estates, reported that they had examined the title deeds relating to the estates belonging to the parish commonly called "Hayle's," situate in St. George's Fields, Southwark, and which was stated to have been purchased of the late Robert Hayle, for the use and behoof of the poor of the parish; and that they thereby found that the said estate was originally held by sixteen inhabitants of the parish, as trustees for the purposes aforesaid; and that when such trustees should from time to time be reduced, either by death or removal out of the parish, to the number of five, or less, then the survivors should fill up the trust again, to the number of sixteen, of whom the then rector and church-wardens of Lambeth should be a part; and that the last trustees were nominated by the parishioners in vestry assembled; and that the trust was, by death or removal out of the parish, then reduced to the number of five; and it was, at such meeting of the 6th of August, 1782, resolved, that the vestry approved of the report of the committee, and nomi-

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nated, as proper persons to fill up the vacancies of trustees, the several parties therein named; and by indentures of lease and release, dated the 5th and 6th of August, 1782, the charity estate was vested in the then surviving and the new trustees; and a declaration was inserted in the deed of release, respecting the appointment of future trustees, similar to that in the deed of 1769. A like proceeding took place in 1806, on the appointment of other new trustees. New trustees were subsequently nominated and appointed by the surviving trustees, without the intervention of the parishioners; and the defendants to the suit, who filled the office of trustees of the charity, were all of them so appointed. The information charged, that none of these parties were validly appointed trustees, and that the legal estate was not, under the circumstances stated in the information, validly conveyed to them; and that, in fact, there were no legal trustees of the charity in existence. The information prayed that it might be declared that the premises comprised in the deed of the 1st of December, 1671, were purchased out of the funds of the parish, and were applicable to the general purposes of the parish, for the benefit of the poor inhabitants thereof; and that it might be declared that there were no duly or legally appointed trustees of the said premises, and that it was doubtful in whom the legal estate therein was vested, and who was the last surviving and duly and legally appointed trustee; and that new trustees might be appointed, and that the premises might be vested in such new trustees; and that it might be referred to the master to approve of sixteen proper persons to be such trustees; and that the defendant, Charles Browne Dalton, the present rector of the parish, might be appointed one of such trustees, and three out of the four defendants, the present church-wardens of the parish, might be appointed three of such trustees, and that the remaining twelve of the trustees might be appointed out of proper persons to be elected and chosen to be trustees by the rate payers or parishioners in vestry assembled. And the information also prayed that a scheme might be settled for the future management of the charity.

Turner and Bagshawe, for the relators.

J. Humphry, Lloyd, and Younge, for the trustees other than the rector and church-wardens.

Roupell and James, for the church-wardens of the parish.

Walpole, Rogers, Giffard, and Follett, for other parties.

LORD LANGDALE, M. R. This information was filed by the attorney general, at the relation of certain inhabitants of the parish of Lambeth, against the rector and church-wardens of the same parish, the incumbents of the ecclesiastical districts into which the parish is divided under the Church Building Act, the church-wardens of those districts, and against Field and others, trustees of the property or

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estate, which in the pleadings is called "Hayle's Estate." The estate was comprised in and conveyed to trustees by an indenture, dated the 1st of December, 1671. The information prays that an account may be taken of the hereditaments therein comprised, and for a declaration that the same were purchased out of the funds of the parish of Lambeth for the general purposes of the parish, for the benefit of the poor inhabitants thereof, and that there are no duly or legally appointed trustees of the property, and that it is doubtful in whom the legal estate of the same hereditaments is now vested, and who was the last trustee. The information prays that new trustees may be appointed, and that the land may be vested in such trustees, when appointed, upon the several trusts; that the present rector be appointed one, and three of the church-wardens be appointed three trustees, and that the remaining twelve of the sixteen trustees, which it is alleged there ought to be, may be duly elected and chosen by the rate payers or parishioners of the parish; and that a scheme may be settled for the further management of the estate, and the due application of the rents and profits from and after the expiration of the existing leases, and for other purposes. The land in question was purchased from Hayle and his wife, in 1671, for the sum of 300*l.*; the conveyance was made to the rector, to twelve persons who are described as of the parish, and to the three church-wardens of the parish. The conveyance is not expressed to be made on any trusts, and there is no contemporary deed or declaration of trust produced; but two of the persons to whom the conveyance was made, viz., Henry Forty and William Phillips, by indentures of lease and release, dated the 10th and 11th of January, 1700, conveyed the estate, for a nominal consideration, to the Rev. George Hooper, the rector, and certain inhabitants, and to the church-wardens; and in the indenture of release it is recited that Thomas Tompkins, and the other persons to whom the conveyance was made in December, 1671, did declare that the conveyance to them of the estate was so made to them, and that they did by virtue thereof stand seized of the same premises, upon trust to manage it, and pay the rents to the rector and church-wardens for the time being, to be from time to time disposed of to the relief of the poor inhabitants of the parish, as the rector and church-wardens should think fit; and that whenever all the trustees, except five, should happen to die, the said five persons should convey and assure the premises to the use of themselves and eleven other parishioners, inhabitants of the parish, of whom the rector and church-wardens for the time being were to be four, upon the same trusts as thereinbefore and after declared, with a proviso, to indemnify the trustees for the time being. This recital in the deed of the 11th of January, 1700, is the only evidence of the original trust, and of the purposes of the trust. As the trustees were in process of time reduced, the direction for a conveyance to new trustees by the five survivors appears to have been neglected. Nothing is said in the deed as to the mode in which the parishioners and inhabitants, who were not rector or church-wardens, were to be nominated and appointed trustees. But in the year 1700, the trustees of 1671 being

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reduced to two, new trustees were appointed, and they, together with the rector and three church-wardens, constituting sixteen trustees, a conveyance was made to them by the two survivors of the old trustees on the trusts therein mentioned, which are the same as those recited to have been declared by the deed of 1671; and we learn from that, that the estate was to be held on trust to pay the rents to the rector and church-wardens for the use of the poor inhabitants of the parish. It was admitted, on the hearing of the cause, that the particular distribution of the income, which ought to be made for the benefit of the poor, must be the subject of a scheme.

The principal question was, by whom new trustees, to be added to the rector and church-wardens, ought, when required, to be appointed; it being contended on behalf of the informant, that the new trustees should be nominated by the rate payers of the parish; while the defendants, who now claim to be trustees, contended that the right of nominating new trustees belongs to the surviving trustees, without the intervention of the parishioners at large. The words of the recited declaration give no information by which the question can be decided, and it is quite consistent with them that the new trustees, not being the rector or church-wardens, who were to be added to the surviving five, should be nominated by the surviving five, or in some other manner. The history of the trust is involved in great obscurity, probably in consequence of the deed of 1671 not being forthcoming. It appears, however, that in 1667, certain persons, appointed at a parish meeting, were empowered to inquire after some purchases whereupon the stock of the parish might be laid out and improved for the benefit of the poor of the parish, but it does not appear that any thing was thereupon done, or whether the purchase from Hayle was the result of the appointment then made, nor have I found any information of what was done till very near the time when the deed of January, 1700, was executed. But it appears that several years previous to the year 1700, and up to the year 1700, ending, according to the computation of that time, in March, 1701, the church-wardens' accounts were entered in the parish books and annually audited. The trust land in question was let on lease to a person of the name of Pennall, and the receipt for Pennall's rent was entered in the church-wardens' account. The renewal of Pennall's lease was contemplated, and in the church-wardens' account for the whole year 1700, ending in March, 1701, according to the present computation, we find these items:—

“ December 2. Expended with Mr. Ayliffe, and some gentlemen of the parish, to advise about the deed of trust for Pennall's land,		s. d.
	7	0
December 16. Expended in going to the gentlemen who were to be the trustees for Pennall's land, to have their consent to be put into the trust,		3 4
January 8. Expended going to acquaint the gentlemen that were trustees when to meet to sign the deed of trust,		6 6.”

As Henry Forty and William Phillips were at that time the only

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surviving trustees, it may, I think, be presumed that the business of appointing new trustees in January, 1700, was managed by the parish; and we thus obtain grounds for thinking that the appointment, contemporaneous with the first evidence of the trust, was by the parish. It does not appear that this mode of proceeding was adopted in consequence of the trustees' being reduced below five; and as there is no earlier evidence of any mode of appointment, it seems reasonable to consider it was then, at least, understood that the nomination of new trustees was with the parish. It further appears, that at the vestry meeting of the parish held on the 23d of June, 1725, it was agreed that certain persons then named, together with the rector and church-wardens for the time being, should be appointed trustees of the estate therein mentioned, one of which is described as the estate purchased by the parish in St. George's Fields, and that any five of them, with the church-wardens, should be a committee, and have full power to let leases. The surviving old trustees and the new trustees joined in granting a subsequent lease to Pennall; and thus it appears that the surviving old trustees were acting in concurrence with the new trustees, nominated, as it seems, by the parish. The estate, and the trusts to which it was subject, do not appear to have been managed or administered upon any regular consistent plan, and it is probable that the knowledge once possessed on the subject became obscured. On the 18th of October, 1760, a lease of the trust premises was granted by the rector and church-wardens of the parish alone to Thomas Jemmitt, and in such lease the premises are described as having been theretofore purchased by the rector and church-wardens, with the consent and approbation of the parishioners in vestry assembled, out of their common savings or contributions. In September, 1763, it was agreed by the parishioners in vestry assembled, that a proposal made by John Biggin, Esq., to take a lease for five years, should be accepted, and a lease of the premises was granted by the rector and church-wardens. The want of regularity in the proceedings is sufficiently apparent, but so far as the facts are made known, nothing occurs inconsistent with the claim made by the information, that the new trustees ought to be from time to time nominated by the parish. In 1769, the parish being in debt, and in want of money for repairing the church and other purposes, it was resolved to raise the sum of 1800*l.* by borrowing money on annuities for lives, and that the estates called "Pedlar's Acre" (not in question in this cause) and "Hayle's Estate" be given as security for payment of the annuities, by conveying the estates in trust to certain persons appointed to pay the annuities; and it was resolved, that the improved rent, which might be made by granting new leases of Hayle's estate, should go some way towards paying the annuities; and when the annuitants were all deceased, the parish would be free from incumbrance, and enjoy the free proceeds of the estate. It is said that Theobald the elder was the surviving trustee in the indenture of 1700, and that he by his will devised the residue of his real estates to James Theobald and Peter Theobald, and in 1769 the legal estate was vested in James Theobald and in Peter Theobald. By an indenture, dated the 10th

of June, 1769, between James Theobald and Peter Theobald, and the Rev. Beilby Porteus, described as rector of the parish, and other persons, after reciting that the parishioners and inhabitants of the parish had elected and chosen the several persons parties of the second part to be trustees in the room and place of the former trustees, it was witnessed, that the estate was conveyed to the use of seventeen persons, named as parties of the second part, and their heirs, upon trust to manage, dispose of, and pay the rents and profits to the rector and church-wardens, to be by them disposed of for the benefit of the poor of the parish, as the rector and church-wardens should think fit and judge convenient; and it was declared and agreed, that when and as often as the trustees should be reduced to the number of five, or less, then the remaining trustees should, with all convenient speed, convey and assure the estate to such other persons as the major part of them should nominate and appoint, but so that the rector and church-wardens should be of the number, and constantly succeed. The information alleges that this indenture, so far as it purported to provide for the appointment, by the remaining trustees, of new trustees, was wholly unwarranted, and of no effect. On the 6th of January, 1782, there were seven surviving trustees, and, at a meeting of the parishioners in vestry assembled, it was reported by a committee previously appointed to examine the title deeds, that the estate was originally held by sixteen trustees, and that when such trustees were reduced to the number of five, or less, the survivors were to fill up the trust again; that the last trustees were nominated by the parishioners and inhabitants of the parish in vestry assembled; and that the trustees were then, by death or otherwise, reduced to five. It was then resolved that the vestry approve the report, and nominate as proper persons for trustees the several persons then named; and by indentures, dated the 5th and 6th of August, 1782, between the surviving trustees of the one part, and the new trustees of the other part, after reciting that the parishioners and inhabitants of the parish in vestry assembled had elected and chosen the new trustees, it was witnessed that the estate was conveyed on the old trusts, and with a clause similar to that contained in the deed of 1769. As to the appointment of new trustees, a like proceeding was had, and a similar conveyance made, in the month of February, 1806, and there have been subsequent elections of new trustees, and a conveyance to them; and, by virtue of such appointment and conveyance, the defendants Field and others allege that they have been duly appointed, and are now the trustees.

The fact seems to be, that none of them were appointed, or in any way stated or alleged to be appointed, by the parishioners or inhabitants in vestry assembled; and on that ground the information insists that none of them were duly appointed, and that they are not entitled to act as trustees. The principal question being, how new trustees ought to be appointed, it is very unfortunate that the only evidence there is of the trusts on which the lands were originally conveyed gives us no distinct information on the subject. The conveyance was to sixteen persons, of whom the rector and church-wardens were four;

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and the declaration of trust recited in the deed of 1700 says no more than that whenever all the trustees, except five, shall happen to die, the five are to convey the estate to new trustees, without saying how they are to be nominated. The question is, no doubt, involved in very great obscurity; but considering that the only evidence we have of the original declaration of trust is not inconsistent with the claim made by the information; that the first evidence that we have in relation to the business of appointing new trustees affords some reason to think that the new trustees were then appointed by the parishioners in vestry assembled; that there is evidence of the estate having been purchased out of funds belonging to the parish, and that it was managed (although not regularly) by the parish at vestry meetings; that there is distinct evidence of new trustees having been appointed at a vestry meeting on the 23d of June, 1725; that there are in succession three several deeds, solemnly executed, each of them containing a distinct recital that the new trustees were appointed by the parishioners and inhabitants of the parish in vestry assembled, viz., the deeds of 1769, 1782, and of 1806; that there is no mention of a nomination by the surviving trustees till the year 1769, and that notwithstanding the provision in this deed and the subsequent deeds of August, 1782, and February, 1806, it is in those deeds repeatedly recited that the new trustees were in fact nominated by the parish; and further considering that this mode of nomination — which was not asserted before 1769, and was not acted upon in 1769, or in 1782, or in 1806, when it was also asserted, but was acted upon only at a subsequent period — cannot affect the right of the parishioners if the nomination was with them, and that in such circumstances we ought to be guided by the earliest evidence of usage; and further presuming that what was then done, and also long afterwards continued, was correctly done, — it does, under these circumstances, appear to me, that, according to the true construction of the deed, the new trustees ought to be appointed by the parish, or by the rate payers of the parish in vestry assembled, and consequently that the present trustees have not been duly appointed. It does not appear to me that this conclusion leads to the consequence which was contended for, that the legal estate is not vested in the persons to whom it has been stated it purports by the deed to be conveyed. There may have been some irregularity, and it does not appear that the title was strictly traced and proved; but with regard to the legal estate, and upon the information now given, I incline to think it is reasonably to be presumed that it is vested in the defendants. If it is desired, I will refer it to the master; but unless it is desired, I should abstain from doing so. There must be a decree for the appointment of trustees and a scheme, and for an account.

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March 24 and 25, and April 16, 1851.

Brick-burning — Neighboring Land Owners — Injunction.

A land owner having built a house, and laid out grounds, shrubberies, and gardens adjacent thereto, before 1829, and having let the same to a tenant, the house was continuously occupied as a dwelling-house from that time down to 1851. Early in 1850 the owner of adjoining land began to manufacture bricks of the clay or earth of the same land, by burning in clamp, which was erected within 144 feet of the dwelling-house, and within fifteen feet of the stable. A bill was filed by the land owner and his tenant, praying an injunction to restrain the neighboring land owner from proceeding with the manufacture of the bricks : —

Held, that the brick-making was a private nuisance, and (as the parties on both sides requested the court not to send a case for the opinion of, or an action to be tried by, a court of law) an injunction must be granted to restrain the defendant from burning bricks on his ground, so as to occasion damage or annoyance to the plaintiffs, or either of them, as owner or occupier of the house and grounds, until further order.

THE bill in this case was filed by Mr. William Walter and Mr. Charles Pressly against Mr. John Selfe, and prayed an injunction as after stated. The allegations in the bill were, that the plaintiff William Walter was seized, to him and his heirs, of divers pieces of land, and the messuages and buildings erected thereon, situate at Surbiton Hill, Kingston, Surrey, and, amongst others, of a piece of land abutting east on the high road from Epsom to Kingston, south and southwest on other land of the plaintiff William Walter, and north on the land and ground of Mr. Thomas Taylor, and also on the north, towards the end thereof, on the land and ground of John Selfe, the defendant thereto; and that the plaintiff William Walter, many years theretofore, and long before the said John Selfe purchased the land and hereditaments hereinafter mentioned, caused a messuage, coach-house, wood-house and other outbuildings to be built on part of the said piece of land and ground so described as aforesaid, and had laid out other parts thereof as a garden, lawn, and pleasure-ground, and had planted trees and shrubs thereon, so as to be enjoyed with the said messuage, and had expended considerable sums of money as well on the said messuage and buildings as on the said garden, lawn, and pleasure-ground, in rendering the same habitable and fit for the residence of a respectable tenant; that the plaintiff William Walter, by an agreement, dated the 2d of May, 1849, and made between the plaintiff William Walter and the said plaintiff Charles Pressly, agreed with the plaintiff Charles Pressly to let him the said messuage, coach-house, wood-house, and buildings, garden and pleasure-ground, for seven years, from the 24th of June then next, at the yearly rent of 150*l.*, subject to the stipulations in the same agreement contained, and that the same premises were then, under or by virtue of such agreement, in the occupation of the said Charles Pressly, and used by him for his residence: that since the date of the said agreement, and in pursuance of an understanding between the plaintiffs to that effect, the plaintiff William Walter had, and before the acts thereafter com-

¹ 15 Jur. 416.

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plained of, expended further large sums on the said messuage, lawn, and premises so let to the plaintiff Charles Pressly as aforesaid, and that in consideration thereof, and of an additional piece of ground, the plaintiff Charles Pressly had agreed to pay the plaintiff William Walter, for the residue of the said term, an increased annual rent, amounting altogether to 172*l.* 10*s.*; that the defendant, John Selfe, about six years since, purchased to him and his heirs a narrow strip of ground, of about one acre and a half, running from east to west, of the width at the east end thereof of about eighty feet, and at the west end thereof of about eighty feet, and that the same abutted towards the east on the said high road from Epsom to Kingston, and in part towards the south and south-west on the premises so let by the plaintiff William Walter to the plaintiff Charles Pressly, and in other part towards the south on the grounds of the said Thomas Taylor, and towards the north on the premises of the plaintiff, the said William Walter, and then in the occupation of Mr. Saunders and Mr. Thrupp, as his tenants; that there was on the said strip of ground of the said defendant a messuage, which was towards and faced the said high road, and distant therefrom 100 feet, or thereabouts, and that the other parts thereof the said John Selfe used partly as a garden attached to the same messuage, and partly, including such parts thereof as abutted on the plaintiffs' said premises, as meadow land, until the time thereafter mentioned; that the defendant was a brick and tile-maker, and carried on his business of a brick and tile-maker at a field, containing about seven acres, about a mile distant from the said strip of ground; that the said defendant used the said piece or strip of ground as garden and meadow land until the end of May or beginning of June, 1850, when the said defendant caused to be dug up at the lower or west end thereof (where, as thereinbefore stated, it was about eighty feet wide) considerable quantities of earth, for the purpose of making bricks and burning them on the said strip of ground; that the defendant had caused considerable quantities of bricks to be made of the said earth so dug up by him as aforesaid, and had set them out for drying on his said strip of ground at the lower or west end thereof, and that the said defendant was then continuing his operations there, and employing several men about the said work; that the said defendant had, in the furtherance of his said object, to burn as well as to dig up earth and make and form bricks on the west end of the strip of ground, and, in order to form a clamp of bricks, drawn in some bricks already burnt to be used for a clamp, and placed the same for the formation of a clamp of bricks, and that the defendant had also drawn in and placed there considerable quantities of large ashes to be used in such clamp, for the purpose of firing and burning the same; and that the part of the said strip of ground, whereon such burnt bricks were placed to form the said clamp, was distant from the said messuage of the said John Selfe 350 feet, or thereabouts, but abutted on the said coach-house, stable, and wood-house on the said premises so let to the plaintiff Charles Pressly by the plaintiff William Walter as aforesaid, and that the said coach-house, stable, and wood-house were distant from his the said Charles

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Pressly's said dwelling-house only fifteen feet, in which he had furniture and property of the value of 2000*l*, or thereabouts. The bill then stated the ordinary course pursued by persons in making bricks, and pointed out the mode in which the defendant was proceeding; and then, after setting out at length a joint notice of both the plaintiffs to the defendant, to the effect, that, if his proceedings were persisted in, an application would be made for protection either to a court of law or equity, as they, the plaintiffs, should be advised, charged that if the defendant should construct a clamp or burn bricks on any part of his said strip of ground, as the plaintiffs charged he intended doing, he would thereby occasion great annoyance and injury, not only to the plaintiff and Pressly as aforesaid, but also to the said Mr. Thrupp, Mr. Nathaniel Saunders, and Captain Hopkins, other tenants of the plaintiff William Walter, occupying messuages and pieces of ground on the other or north side of the defendant's said strip of ground, and adjoining thereto, and would also thereby occasion material and permanent injury to the trees and shrubs planted and growing as well on the said surrounding or adjoining parts of the land of the plaintiff William Walter as on the land and premises in the occupation of the plaintiff Charles Pressly aforesaid; and it was also charged, that if the defendant should carry his threat and intention of burning such bricks into effect, the plaintiffs had reason to believe great and material and permanent injury would thereby accrue to the plaintiffs, and to the said stable, wood-house, coach-house, and dwelling-house, and to the trees, shrubs, and plantations on the said premises then in the occupation of the plaintiff Charles Pressly as aforesaid, and that the plaintiff Charles Pressly would be obliged to quit the same on account of the injury which arose to the health of himself and his family; and that the defendant ought to be restrained by injunction in the manner thereby prayed. It was therefore prayed that the said defendant, John Selfe, his servants, workmen, and agents may be restrained, by the order and injunction of the court, from making or continuing, causing to be made, or continued, a clamp of bricks, or of collecting cinders, breeze, and other materials for the purpose of burning the same, on his said strip of ground, or so near to the plaintiffs' premises as to occasion damage or annoyance to the plaintiffs, or either of them, or of burning or causing to be burnt bricks on his, the said defendant's strip of ground, so as to occasion damage or annoyance to the plaintiffs, or either of them, or to the plaintiff William Walter's said tenants, or injury or damage to the said messuage, coach-house, stable, wood-house, and trees, shrubberies, and plantations erected and growing on the plaintiffs' said premises, or to the messuages, trees and shrubberies erected and growing on such parts of the said premises as were in the occupation of the plaintiff William Walter's tenants as aforesaid; and that all such further and other orders and directions might be made and given as should be necessary and proper for effectually restraining the said defendant, his servants, workmen, and agents, from committing the acts thereby complained of, or doing or causing to be done any act which might cause damage or annoyance to the plaintiffs; and that

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the defendant might pay the costs of the suit. From the affidavits filed in support of a motion for an injunction, it appeared that there existed on part of the property also belonging to the defendant, and situated to the south-westward of the plaintiffs' land, a brickkiln, and still further westward a brick clamp, and of this no complaint had ever been made. The affidavits on the question of salubrity or insalubrity were conflicting, and the same as to the inconvenience to arise from the process of brick-burning; although those of the plaintiffs were very positive as well to insalubrity and inconvenience as to annoyance. The motion was made on the terms of the prayer of the bill, and was supported by

Rolt and G. W. Collins, who cited *Aldred's Case*, 9 Co. 102; 1 Roll. Ab. 88, No. 6; 2 Roll. Ab. 141, No. 13. *Rez. v. White*, 1 Burr. 333; Vin. Ab., tit. "Nuisance." *The Duke of Grafton v. Hilliard*,¹

¹ From the registrar's book, A. 1735, fol. 366, J. S., (and from the order of June 11, 1736, next mentioned,) the case made by the plaintiffs' bill will appear from the following order. The first order was dated the 4th of June, 1836: "Upon opening of the matter this present day unto this court by Mr. Attorney General, Mr. Verney, and Mr. Fazakerley, of counsel for the plaintiffs, it was alleged that there are several fields in the parish of St. George, Hanover Square, commonly called the Hay Fields, which are bounded on the north by Mount Street, Grosvenor Square, on the east by New Bond Street, on the south by Albermarle Street, Dover Street, Berkeley Street, and a row of houses called May Fair, and on the west by Audley Street and Hyde Park Wall, in the easternmost part of which fields, and within a very few yards of the back of the houses in New Bond Street and Grosvenor Street, there are very large quantities of earth made into brick by the said defendants, some or one of them, or others by their directions, and the kilns are erecting for burning the said earth into brick, one of which kilns is within 250 yards of the plaintiff the Duke of Grafton's dwelling-house in Old Bond Street, and within 250 yards of the plaintiff the Earl of Graham's dwelling-house in Albermarle Street, and within 250 yards of the plaintiff Brudenell's house in Dover Street, and within the space of 110 yards of the backs of the houses of the plaintiffs Townshend and the Lady Kaye; and the other of the said brickkilns is within sixty yards of the back of the house of the plaintiff Paget; and both the said brickkilns are much nearer unto several other houses in New Bond Street than unto the said houses of the plaintiffs, and are very near unto the houses in several streets in the parish of St. George; and the defendants intend very soon to set fire to the said brickkilns, and the defendants, some or one of them, have brought stones into the said fields, within a few yards of the said brick-fields, and intend to erect a kiln there for the burning of the said stone into lime; that the burning the said earth into bricks will be so great an annoyance to the said plaintiffs and the other inhabitants of the streets aforesaid, that it will not only oblige several of them to remove from their houses, but will also damage and spoil their furniture; and the turning of the said stone into lime will also be a very great annoyance to them, and will prejudice their houses and furniture: and it is not known that the said fields, or either of them, have ever been made use of for burning of bricks or lime; all which by affidavit appears; therefore, to be relieved in the premises, the plaintiffs have exhibited their bill in this court against the defendants, as by the Six Clerks' certificate appears; and therefore it was prayed that an injunction may be awarded to restrain the defendants, their servants, agents, and workmen, from burning bricks and lime in the said fields, called the Hay Fields, until the said defendants shall answer the plaintiffs' bill, and this court make other order to the contrary. Whereupon, and upon hearing the said affidavits read, it was ordered that the defendants, having notice hereof, do show cause unto this court the last day of this term why they should not be restrained from burning bricks and lime in the places aforesaid."

The order discharging the foregoing is in the same registrar's book, fol. 384, T. P., and is as follows: "Whereas, by an order, bearing date the 4th instant, for the reasons therein contained, it was ordered that the defendants, having notice thereof, should

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(referred to in *The Attorney General v. Cleaver*, 18 Ves. 210;) *Barwell v. Brooks*,¹ 1 Law T. 75, 454; *Haines v. Taylor*, 10 Beav. 75, and *Rex v. Neil*, 2 Car. & P. 485.

March 25. *Malins, Shebbeare, and E. G. White*, for the defendant, cited *The Attorney General v. Cleaver*, (before mentioned;) the order

show cause unto this court the last day of the term, why they should not be restrained from burning bricks and lime in the places therein particularly mentioned; and whereas, by a subsequent order of the 7th instant, for the reasons therein contained, it was ordered that the time for showing cause should be enlarged until this day, they submitting that all things should stay in the mean time: now, upon opening of the matter this present day unto the right hon. the lord high chancellor, &c., by Mr. Solicitor General, Mr. Wilbraham, being of counsel with the defendants, Hilliard, Cock, and Whitaker, who came to show cause against the said order of the 4th instant, alleged, that the Right Hon. William Lord Berkeley being seized of several fields in the parish of St. George, Hanover Square, part of a farm called Hay Hill Farm, they, the said defendants, did, on the 8th day of April last, enter into articles of agreement with the said Lord Berkeley, and with the Hon. John Berkeley, his son and heir apparent, for part of a certain field, called Brickfield, parcel of the said Hay Hill Farm, to build upon, at the yearly rent of 420*l.*, for a term of ninety-four years. That there being some earth upon part of the said ground, thereby apprehending they had good right, by virtue of the said articles, to have the benefit thereof, to make the same into bricks, or to dispose thereof to any person so to do, they sold the same to the defendant Whitaker, with liberty to make and burn the same into bricks upon the said ground, with the restriction in the said articles as to the time of burning the said bricks. That they are restrained by the said articles from setting fire to any bricks that shall be made on the said ground before the 1st day of July next, or to continue the said burning longer than the 1st day of August, at which time it was apprehended that they, the plaintiffs and others, the inhabitants of the neighboring houses, would be gone to their respective country seats. That it hath been usual in all undertakings for building, where fresh ground hath been broken up, to make and burn bricks on any part thereof, whereon brick earth hath been found, notwithstanding there hath been several houses near adjoining to such bricks, inhabited at the same time, and particularly in May Fair and Grosvenor buildings, in the east of which there is at present brick making, and intended to be burnt much nearer to the houses inhabited there than the plaintiffs' houses are to the bricks intended to be burnt on the ground belonging to the said defendants. That the time for burning the said bricks being so short, and the uncertain inconvenience of the same depending upon the wind, they apprehend the same will be but little if any annoyance to the plaintiffs, and will not damage their furniture; and hope they shall not be restrained from burning the said bricks, and making all the advantage they can of the said ground. That as to burning the lime on the said ground, they, the said defendants, are not concerned therein. Whereupon, and upon hearing of Mr. Attorney General, Mr. Weldon, Mr. Brown, and Mr. Clarke, of counsel with the said defendants, and an affidavit of the said defendants, Hilliard, Cock, and Whitaker, read, and what was alleged on both sides, his lordship doth allow the cause now shown, and doth order that the said order of the 4th instant be discharged."

¹ In this case a motion was made before the vice chancellor of England for an injunction to restrain the defendants from burning bricks on their own land, within 200 yards of the plaintiff's property, called East Cowes Castle, in the Isle of Wight, and the same was granted *ex parte*. On the 27th of April, the same was dissolved, with costs, on the ground that the plaintiff purchased his property after the use of the defendants' land as building land, with the burning of bricks thereon, was publicly known, and also apparently on the ground that the brick burning would be temporary only, that is, for so long a time as would suffice for the purpose of building the houses which were intended to be erected on the land of the defendants. The plaintiff then filed amended and supplemental bills, and a new motion was made on the 29th of July, 1843, for the injunction, which on the 8th of August was granted, whereby it was ordered that the defendants, their workmen, agents, and servants, should be restrained from burning any bricks, or causing or permitting any bricks to be burnt, on a partic-

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of the 11th of June, 1736, by which the order to show cause in *The Duke of Grafton v. Hilliard* was discharged; and *Rex v. Davy*, 5 Esp. 217.

Rolt replied.

April 16. KNIGHT BRUCE, V. C. In this cause, the motion of which I have to dispose seeks an injunction in these terms: [After reading the notice of motion, his honor proceeded:] The wording may not be very correct, but the substance of the application is plain enough. One of the plaintiffs sues as the owner, and the other as tenant and occupier, of a parcel of land at Surbiton, in Surrey. The plaintiffs' dwelling-house, with outbuildings appurtenant to it, stands on part; the other part consists of a garden or pleasure-ground, or both, also belonging to the house. It is admitted that the house was built before the year 1829, and has been used and occupied as a dwelling-house continually from a time preceding that year. The land on its north-eastern part adjoins a portion or parcel of land containing more than one acre, but less than two acres in the whole, which belongs to the defendant, and on which, in the spring or early in the summer of the year 1850, he began to manufacture bricks of the clay or earth of the same land, by burning, in what I believe is a common mode of manufacturing, by means of a clamp. It does not appear that before 1850 any manufacture or process of that sort, or of any offensive, objectionable, or disagreeable kind, had been begun on any part of this portion of land, or carried on there. The plaintiffs' dissatisfaction with the defendant's proceedings in this

ular piece of land specified in the order. On the 21st of August, the vice chancellor of England made an order of committal of two of the defendants, for breach or breaches of the injunction. On the 29th of August, a motion was made before the lord chancellor to discharge both these orders, when an agreement was come to, by which it was ordered that a perpetual injunction should issue, for the purpose specified by the vice chancellor of England's order, and, among other things, that a reference should be made to Mr. Swanston, to arbitrate and determine whether any and what damages had been sustained by the plaintiff, and, if any, what compensation should be made to the plaintiff in respect thereof, and also as to certain of the costs incurred. The injunction was to be without prejudice to any question before the said arbitrator. On the 27th of April, 1844, Mr. Swanston stated, by his award of that date, among other things, as follows: "And I further award and determine that not any damage has been sustained by the plaintiff in respect of which any compensation ought to be made to him; and I award and determine that no compensation shall be made to the said plaintiff." The award then provided that the plaintiff should bear his own costs of the suit, and the costs of the defendant Brooks should be paid by him, and that Brooks should also pay the costs of the defendant Cheeseman; that the plaintiff should pay his own costs of the reference, and the defendant Brooks his own costs and the costs of the other defendants of the reference; and that the plaintiff and Brooks should pay the costs of the award in equal moieties.

It was stated during the argument, that the question, whether brick-burning on a man's own land, near his neighbor's house, was or was not a private nuisance, was referred to Mr. Swanston; but nothing appears in the order of reference to him, or in the recitals or body of his award, to show that such was the fact, the saving in the order of reference being confined "to any question before the arbitrator," and that was not one of the questions. In answer, however, to a question from the court, the learned gentleman was understood to say that such was his opinion.

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respect produced the present suit, and the motion now to be decided, which was argued in March last, and upon which certainly I should (whether granting or not granting a provisional injunction) have directed an action or issue, for the purpose of trying the material questions of fact and law raised by the bill and the affidavits, but that the counsel for each party requested me not to do so, and also requested me not to send a case for the opinion of a court of law. I consented to decide it without that assistance; and this, after consideration, and after having had an opportunity of viewing the place myself, I now do, premising that the clamp which the defendant has set up is nearer to the stable of the dwelling-house, which I have already mentioned as belonging to one and occupied by the other of the plaintiffs, than to the dwelling-house itself, but is within less than forty-eight yards of some if not all of the windows of the dwelling-house. The first point disputed, or not conceded, is the question whether, as between the defendant, in his character of a person owning, using, and occupying his parcel of land that has been mentioned, on the one hand, and the plaintiffs, in their character of owner and occupier of the house, offices, and gardens occupied by the plaintiff Mr. Pressly, on the other, Mr. Pressly is entitled to an untainted and unpolluted stream of air, for the necessary supply and reasonable use of himself and his family there; or, in other words, to have there, for the ordinary purposes of breath and life, an unpolluted and untainted atmosphere. And there can, I think, be no doubt, in fact or in law, that this question must be answered in the affirmative; meaning by untainted and unpolluted, not necessarily air as fresh, free, and pure as at the time of building the plaintiffs' house the atmosphere then was, but air not rendered to an important degree less compatible, or, at least, not rendered incompatible, with the physical comfort of human existence—a phrase to be understood, of course, with reference to the climate and habits of England. It is next to be considered whether the defendant has intercepted or purposes to interfere materially with this right of the plaintiff Mr. Pressly. That the process of manufacturing bricks in the manner begun, and now continued by the defendant, must communicate smoke, vapor, and floating substances of some kind to the air, is certain. I think it plain, also, from the relative position of the two parties, that this smoke, and this vapor, and these floating substances (the burning being to the westward of the defendant's own house) must wholly, or to a great extent, in fact, become mixed with the air supplied to the plaintiffs' house, and part at least of the garden or pleasure-ground belonging to it, and this without being previously so dispersed or attenuated as to become imperceptible, or to be materially impaired or diminished in force. I conceive that the plaintiffs' house, and, at least, part of the pleasure-ground or garden, must in general, or often, if the manufacture shall proceed, be subjected substantially, as far as the quality of the atmosphere is concerned, to the original and full strength of the mixture or dose produced. I speak without forgetting the trees that stand along the line of the boundary, and without assuming their continuance or the contrary. The question then arises, whether this is or will be an

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inconvenience to the occupier of the plaintiff, Mr. Walter's house, as occupier — a question which must, I think, be answered in the affirmative — though whether to the extent of being noxious to human health, to animal health in any sense, or to vegetable health, I do not say, nor do I deem it necessary to intimate any opinion, for it is with a private, and not a public nuisance, that the defendant is charged. The important point next for decision may properly, I conceive, be thus put: Ought this inconvenience to be considered, in fact, as more than fanciful, or as one of mere delicacy or fastidiousness — as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among the English people? And I am of opinion that this point is against the defendant. As far as the human frame, in an average state of health at least, is concerned, mere insalubrity, mere unwholesomeness, may possibly be out of the case; but the same may perhaps be asserted of melted tallow, and other such inventions, less sweet than wholesome. That does not decide the dispute. Smell may be sickening, though not in a medical sense. Ingredients may be, I believe, mixed with air of such a nature as to affect the palate disagreeably and offensively, though not unwholesomely; a man's body may be in a state of chronic discomfort, still retaining its health, and perhaps suffer more annoyance from impure or fœtid air, from being in a hale condition. Nor do I conceive it essential to show that vegetable life, or that health either universally or in particular instances, is noxiously affected by contact with vapor and floating substances proceeding from burning bricks, for the plaintiffs have, I think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort and existence to the occupier and inmates of the plaintiffs' house, whatever their rank or station, or whatever their state of health may be. It has been suggested that a kiln and clamp, which are in the neighborhood, independently of the defendant's property, preclude the plaintiffs from complaining against him. I do not, however, so view the matter. That clamp has not, nor has the kiln, ever been treated by the plaintiffs as unlawful or a grievance. They are considerably more remote from the plaintiffs' house than the defendant's clamp; and, if a nuisance, do not form a reason why the defendant should set up an additional nuisance. There is no ground, I think, for inferring a license to him, or for saying that the inconvenience to which I have referred must not, if not wholly occasioned anew, be much increased by the course taken, or proposed to be taken, by him. Nor do I consider as material what has been urged by the defendant, whether with or without accuracy, in point of fact, as to the aspect or position of the windows of the plaintiffs' house, which has windows looking, as far as I could judge, nearly east-south-east and west-north-west. It has been suggested, as a ground for not interfering against the defendant, that, in making and burning bricks on his land, he is only using his own soil in a manner at once common and useful, and in a convenient way for himself, and the case

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has been compared to that of a mine. The argument, if adopted, would prove too much. There are notorious instances of various kinds, in which the rights of a neighboring occupier, or a neighboring proprietor, prevent a man from using his land, as, but for those rights, he properly and lawfully might use it. A man may be disabled from building on his own land as he may wish, by reason of his neighbor's rights. So the proprietor on whose land a spring arises may be unable to stop, divert, or foil it, by reason of the rights of proprietors of neighboring land. It may be one of the most convenient things in the world for the owner of a mine to manufacture or smelt the mineral at its brink, but there may be the rights of others which make it unlawful for him to do so. The case of a chalkkiln, or a limekiln, is an acknowledged case in point of law, and I am not aware that it makes a difference whether the limestone or chalk is obtained from the same land or not. The paucity of authority on the subject of brick-burning is a circumstance not unfavorable to the defendant, but I am not aware of any authority for saying that it cannot be a private nuisance. I do not consider the case of *The Duke of Grafton v. Hilliard*, noticed in *The Attorney General v. Cleaver* by Lord Eldon, and more fully in Mr. Blunt's edition of Ambler, to have so decided. Lord Hardwicke's order of the 11th of June, 1736, which I have read, seems to have proceeded upon the special circumstances of that case, and does not, I think, govern the present, or affect it in the defendant's favor, seeing that he and the plaintiffs concur in desiring not to go before a jury, or to be referred to a court of law in any way. The question, it appears, was decided recently, in an arbitration by a distinguished member of this bar, whose accuracy and learning are universally acknowledged. He determined between two neighboring proprietors that brick-burning, the clay being the clay on the land of one, was a private nuisance to the other. His decision was probably correct in fact, and certainly correct in law. It was considered by Vice Chancellor Shadwell, before whom and Lord Lyndhurst it had been previously, to be so; and two judges now on the bench, whose opinions I estimate very highly, have informed me that they considered a private nuisance to be committed by a man who burns bricks on his own land, made of his own clay, if he does it so near to the house of his neighbor as to cause him substantial inconvenience and material discomfort. In the absence of special circumstances disabling the occupier from complaining, it appears to me in the present instance, that, the defendant as well as the plaintiffs declining to go before a jury, and asking the Court of Chancery to decide between them, without assistance in any shape from the court of law, I ought to grant an injunction. The order may be in these terms: The defendant and the plaintiffs by their counsel declining to try an action as to the alleged matters in the bill mentioned, and requesting the decision of this court upon the motion, without any assistance from a jury or a court of law, let the defendant, his servants, workmen, and agents, be restrained by injunction from burning, or causing to be burnt, bricks on the defendant's strip of ground in the bill mentioned, so as to occasion damage or annoyance to the plaintiffs,

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or either of them, as owner or occupier of the messuage in the bill mentioned to be occupied by the plaintiff, Charles Pressly, or injury or damage to the messuage, coach-house, wood-house, shrubberies, and plantations in the bill mentioned to be occupied by the plaintiff Charles Pressly, until further order.

ALLEN v. LODER.¹

April 27, 1851.

Practice — Appearance — Absconding.

THIS was a motion preparatory to entering an appearance for an absconding defendant, under the 31st order of May, 1845. The affidavits filed in support of the application showed that the defendant was keeping out of the way to avoid a warrant to apprehend him for deserting his wife and children, which had been placed in the hands of a police officer.

W. W. Cooper, in support of the application, cited *Cope v. Russell*, 2 Ph. 404.

LORD CRANWORTH, V. C., doubted whether, as the defendant was absconding on account of a criminal proceeding, it was within the terms of the 31st order; but ultimately he made the order required.

NICHOLAY'S CASE.²

April 28, 1851.

Contributory.

THIS was a motion to have the name of J. Nicholay struck off the list of contributories to the Barnet and North Metropolitan Junction Railway Company. The evidence produced consisted of the following letters:—

"Barnet and North Metropolitan Railway Company, }
"London, 3d October, 1845."

"Sir: We are directed by the committee of management to inform you that each member of the provisional committee will have a right to call for shares in this company, not exceeding 100 in number, by filling up the annexed form of application, and forwarding the same to the secretary on or before Wednesday, the 9th inst."

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This letter was signed by two persons as secretaries to the company, and directed to Mr. Nicholay. Mr. Nicholay sent the following answer :—

“Sir: In answer to your letter annexed hereto, I agree to take 100 shares of 20*l*. each in this company, and to pay a deposit of 2*l*. 2*s*. per share, and to sign the necessary deeds when required. 6th of October, 1845.”

On the 23d of October the secretary wrote an answer, that 100 shares had been allotted to Mr. Nicholay. Nothing further was done by Mr. Nicholay; but the company having come under the Winding-up Act, the master had placed the name of Mr. Nicholay on the list of contributories.

Roxburgh, now moved to have the name struck out of the list. There is no proof of any prospectus having been published with Mr. Nicholay's name, or any other publication or pledging of his credit to the world. He is only an allottee of shares, and there is nothing to show that he ever accepted the office of provisional committee-man, as in *Upfill's Case*, 14 Jur. 843; s.c. 1 English Reports, 13.

LORD CRANWORTH, V. C., (without hearing the other side.) The letter is addressed to him as a provisional committee-man, and he does not object, and would have claimed the benefit of being such. In *Upfill's Case* nothing turned upon the publication of the prospectus.

Motion refused.

GRIFFITH & others v. VANHEYTHUYSAN.¹

May 6, 1851.

Pleading — Parties — Misjoinder — Trustees — Cestui que Trust.

One of several trustees, upon a representation that the trust fund was required for payment of debts of the testator under whose will the trust arose, obtained from his co-trustees a power of attorney, by means of which he sold out the fund, and appropriated it to his own use. He afterwards died insolvent. One of the *cestuis que trust* took out administration to the insolvent, and then, in conjunction with the other *cestuis que trust*, as co-plaintiffs, filed a bill to charge the estates of the deceased co-trustees of the insolvent with the loss of the fund, as having been occasioned by a breach of their trust. The bill was dismissed at the hearing, for misjoinder, and with costs as against those defendants who had taken the objection by their answer.

In 1829, a sum of 915*l*. consols was standing in the names of Smith, Plaister, and Vanheythuysan, as trustees, upon trusts, under which the plaintiff Griffith and his co-plaintiffs were the parties beneficially interested. In that year Vanheythuysan represented to his co-trustees that part of the fund would be required for the payment

¹ 15 Jur. 421.

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of debts of the testator by whose will the trusts of the fund had been created. Smith and Plaister thereupon executed a power of attorney to Vanheythuysan, by means of which the latter sold out the whole fund, and afterwards applied it to his own purposes. Vanheythuysan became insolvent, and died. Smith likewise died, having appointed an executor. The defendants R. E. Vanheythuysan and M. Marshall were then appointed trustees of the trust fund in lieu of Smith and Vanheythuysan, deceased. Plaister then died, having appointed executors. There being no personal representative of Vanheythuysan, the deceased trustee, the plaintiff Griffith took out letters of administration of his estates and effects. The bill was filed against the personal representatives of the two deceased trustees, Smith and Plaister, and the two new trustees, stating that Smith and Plaister, by giving a power of attorney to Vanheythuysan, and thereby enabling him to misapply the fund, had committed a breach of trust, and had thereby made themselves and their estates liable to replace the lost fund; that the other defendants, the present trustees, had been asked, but had refused, to enforce against the representatives of Smith and Plaister the replacement of the fund; that Vanheythuysan had died insolvent, and that no part of his assets had been received by Griffith; and praying that it might be declared that Smith and Plaister were liable in respect of the breach of trust alleged to have been committed by them, and that the defendants, their representatives, might be decreed to make good the trust fund, and that they might respectively admit assets for the purpose, or that the usual administration accounts of the estates of their respective testators might be taken. The representative of Smith, by his answer, objected to the suit on the ground of misjoinder, inasmuch as Griffith represented conflicting interests — one of *cestui que trust*, and the other of representative of the trustee primarily liable.

Bethell and Follett, for the plaintiffs.

The Solicitor General and *Piggott*, for the representatives of Plaister, objected that there was a misjoinder of the plaintiffs, and that no decree could be made. The case made by the bill was, that Vanheythuysan, the deceased trustee, received the money, and applied the same to his own use, thereby defrauding not only the *cestuis que trust*, but also his co-trustees; and that the latter, by giving the power of attorney, had rendered themselves liable. Griffith representing Vanheythuysan, the case, as between him and the parties sought to be made liable, must be dealt with as if Vanheythuysan were himself the plaintiff. Were that the case, would it be possible to contend that a suit could be maintained by the guilty party against his victims? Griffith would be clearly incapable of sustaining the suit as sole plaintiff, and his position in that respect could not be improved by the joinder of others as co-plaintiffs. *Jacob v. Lucas*, 1 Beav. 436. *Lambert v. Hutchinson*, Id. 277.

Giffard, (with whom was *Roll*,) for the representative of Smith,

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said, that in the event of accounts being taken as against the estate of Vanheythuysan, the interest of Griffith, as representing that estate, would be at variance with his interest and that of his co-plaintiffs as *cestui que trust*. It would be impossible, in such a state of the record, that the accounts could be properly taken. Parties having adverse or inconsistent rights in the subject matter of the suit could not be joined as plaintiffs. *Padwick v. Platt*, 11 Beav. 503. *Fulham v. M'Carthy*, 1 H. L. C. 703. The suit stood in the same position, with reference to this objection, as if Griffith were sole plaintiff, and had the missing fund in his pocket, in which case it would be impossible for him to sustain a suit against the co-trustees of Vanheythuysan, who, as between him and them, were entirely innocent.

Bethell said that Griffith sued in his character of *cestui que trust*. In compliance with the rule of the court requiring all parties interested in the subject matter of the suit to be represented, he had clothed himself with the legal title of representative of Vanheythuysan. In that character he had not received any thing. The bill contained allegations to that effect, and to the effect that the estate of Vanheythuysan was insolvent. Could it be contended, that the adoption of the mere formal character of representative was sufficient to deprive him of his right to sue in respect of his beneficial interest? Suppose Griffith to have been the sole party beneficially interested, and suppose Vanheythuysan had named an executor, and that executor had afterwards died, having appointed Griffith his executor, and Griffith had accepted the office in ignorance that his testator had been the executor of Vanheythuysan, could it be contended that Griffith would thereby lose the right of maintaining his demand at all? If the objection would fail in such a case, where Griffith was suing alone, it could not be maintained where he was joined with other co-plaintiffs. The accruer of the right of representation could not deprive him of the right to sustain his suit. At law his beneficial interest would merge in his interest as representative, and he would be unable to sue; but in this court it was otherwise. The cases cited from Beavan had no application to the circumstances of the present case. In *Jacob v. Lucas* the infant plaintiffs were the sole parties beneficially interested in the subject matter of the suit, and they were joined as co-plaintiffs with another party who had no beneficial interest, and was the party primarily liable to make good the loss occasioned by the breach of trust. The fund in that case was appropriated by the tenant for life, but the breach of trust was the act of the trustees, of whom one sued as co-plaintiff. That was not the case here. Griffith was beneficially interested equally with his co-plaintiffs in the subject matter of the suit, and he was merely a formal party in his character of representative. The case of *Lambert v. Hutchinson* was decided on a different principle. There one of the co-plaintiffs was found to be bound by a settlement of accounts equivalent to a release, and it was held that the suit could only be maintained on the footing of all the co-plaintiffs being held bound by that settlement.

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The *Solicitor General*, in reply.

Bagshawe and *Davidson*, for the new trustees.

SIR GEORGE TURNER, V. C., said the bill was filed by co-plaintiffs claiming a beneficial interest as *cestuis que trust* in the subject matter of the suit, but one of whom at the same time represented the estate of one of the several trustees, who was either primarily liable or jointly liable with his co-trustees for a breach of trust. In all cases of that character, what the court had to consider was, what the decree was to be. Of course, in the case before him, the decree would involve an account of the estate of Vanheythuysan, received by the plaintiff Griffith. Now, how could such an account be taken as between Griffith and his co-plaintiffs in the suit? There was a direct conflict of interests between Griffith, as representative of Vanheythuysan, and his co-plaintiffs, to whom he was bound to account in his character of representative. The principle of the objection of misjoinder was, that the suit was so constituted that the accounts could not be taken. In the event of a question arising, in taking the account of Vanheythuysan's estate, as to fixing Griffith with liability, it might happen that every item in the account would be disputed. In that case it would become the interest of Griffith to defend the estate of Vanheythuysan against the other plaintiffs. How, in such a case, could the contest be maintained between the plaintiffs interested in recovering Vanheythuysan's estate, and the other plaintiff, who would have to account? In that state of the record, and having regard to the authorities which had been cited, and particularly the case of *Jacob v. Lucas*, he thought the suit could not be sustained. The case of *Jacob v. Lucas*, he thought, was undistinguishable from the case before him. An ingenious argument had been used by Mr. Bethell, founded upon the supposition of a suit by a sole plaintiff, uniting in himself both a beneficial interest and a representative character. It would be time to pronounce upon a case of that description when it should arise. Probably, when that occurred, the case might not be found open to precisely the same difficulty as the present case; for the sole plaintiff, if he were also a party, and liable to account in his representative character, might submit by his bill to account for the whole fund received by him, and thus he would be accounting to the defendants for the whole of his receipts. That case, should it arise, might therefore be found not to be governed by the same principles as were applicable to the case before the court, in which others were joined with Griffith as co-plaintiffs; and the account could not be taken as between plaintiff and defendants. He thought, then, that the objection must be allowed, and that the bill must be dismissed; and it would be dismissed with costs, as against those defendants who had taken the objection by their answer.

Watts v. Jefferyes.

WATTS V. JEFFERYES.¹

February 19, 1851.

Judgment Creditor — 1 & 2 Vict. c. 110, s. 12 — Accountant General's Check — Sheriff to take under Fieri Facias.

A judgment having been entered up against a party to whom a sum standing to the credit of the cause had been ordered to be paid, and the accountant general having drawn a check for the sum, and delivered it to the attorney of the debtor, who subsequently returned it to the accountant general, the court, on the petition of the judgment creditor, gave the sheriff liberty to take the check under a *fi. fa.*

By the act 1 & 2 Vict. c. 110, it was the intention of the legislature to make property of a judgment debtor, which is in such a position that the creditor cannot lay hold of it, liable to the judgment.

Where there is in the possession of any officer of the court property which proves to be liable to a creditor, or to be held for the sole benefit of any person, it is improper to seize it without an order of the court.

ALEXANDER TAYLOR was entitled, under the will of the testator in the cause, to an annuity terminable on assignment. The annuity was in arrear, and by an order, dated the 18th of November, 1850, a sum of 500*l.* cash, part of a larger sum of cash placed to the credit of the cause, was ordered to be paid to Taylor in satisfaction of the arrears. Some time previously to the date of this order, the petitioner Reece had recovered judgment in the Court of Exchequer against Taylor for the arrears of an annuity due upon a bond of Taylor to Reece, and costs, amounting together to a sum of 381*l.* 12*s.* 7½*d.*, for which judgment was duly entered up. On the 27th of November, 1850, Reece issued a writ of *fi. fa.* upon the judgment, directed to the sheriff of Middlesex, to levy the sum of 452*l.* 5*s.* 10*d.* then due upon the judgment; and on the 28th of November, 1850, presented his petition in the cause, stating that he had only lately discovered that there was then in the hands of the accountant general of the Court of Chancery, or that he was about forthwith to draw a check on the Bank of England for the sum of 500*l.*, to be paid to Taylor pursuant to the order of the 18th of November, 1850; and that Taylor was living abroad, and had no other property in this country, as far as the petitioner was aware, upon which execution could be levied, but the check. The petition prayed that the accountant general might be ordered not to deliver over the check to Taylor, his solicitors or agents, or any of them, and that he might be directed to deliver the same to the sheriff of Middlesex, or allow the sheriff to take or seize the same under the writ of *fi. fa.* The petition came on to be heard, *ex parte*, before Knight Bruce, V. C., on the 28th of November, 1850, when his honor made an interim order, that the check should not be delivered out until the 3d of December, inclusive. On the 3d of December, at the request of Taylor, it was ordered that the petition should stand over till after the second day of Hilary term ensuing, and the interim order was continued. The second day of Hilary

¹ 15 Jur. 435.

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term falling upon Sunday, the order staying the delivery of the check expired before it could be further continued, and the check was delivered up, under a power of attorney from Taylor, to a person named Chauntler, who, upon discovering the circumstances, subsequently returned it to the accountant general's office, to abide the issue of the petition. On the 13th of January, to which day the petition-day stood adjourned, Taylor asked that the petition should stand over for a further time, intimating that it was his intention to file a bill to impeach the bond; and it was then ordered that the check should be delivered to the sheriff of Middlesex under the *fi. fa.*, but that the order should not be delivered up by the registrar until the 24th of January. In the mean time, on the 21st of January Taylor filed a bill against Reece and others for the purpose of setting aside the bond, and praying that the order of the 13th of January might be discharged, and that Reece might be restrained from prosecuting or receiving the order, or issuing execution or prosecuting any action on the bond. Reece appeared, and put in his answer to the bill. On the 7th of February, upon motion by the plaintiff, in the terms of the prayer of the bill, and it having been arranged that the petition should be considered as heard with the motion, his honor refused the motion, reserving the costs, and directed the petition to stand over to the 11th of February. On the 11th of February it was ordered that the petition should be dismissed, with costs, but that the check should not be delivered out till the 18th of February, in order to give the petitioner an opportunity to appeal against the order. From this order Reece now appealed to the lord chancellor.

Bacon and Smythe, for the petition of appeal. The single question for the court to decide is, whether, under the stat. 1 & 2 Vict. c. 110, a judgment creditor has a right to attach moneys of his debtor in the hands of the court, or to seize the instrument upon which such moneys are payable. That act was passed, as appears from the preamble to the 11th section, to give judgment creditors more effectual remedies against the real and personal estate of their debtors. The 11th section empowers the sheriff to deliver execution of lands and hereditaments; the 12th section, to seize and take money, bank notes, "and any checks;" the 13th makes a judgment a charge on real estate; and the 14th enables a judge of one of the superior courts to make a charging order upon stock or shares belonging to the judgment creditor. A distinction is taken between property producing annual increase, and securities for money, which are capable of being seized; and the former only are affected by the 13th and 14th sections. Then came the declaratory act, the 3 & 4 Vict. c. 82, which extended the powers of a judge, under the 14th section of the former act, to stocks and shares standing in the name of the accountant general, enabling the judge to make an order as to such stocks and shares in the same way as if they had been standing in the name of a trustee of the judgment debtor. The declaratory act applies to the description of property mentioned in the 14th section. It contains no declaration applicable to the 12th section, because

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none was thought requisite. It is upon the 12th section¹ that this petition proceeds, and it is clearly within the equity of that section. By the order of the 18th of November, the 500*l.* was ordered to be paid to Taylor, the judgment debtor. Immediately that order was pronounced, and before it was delivered out, the money belonged to Taylor, and, therefore, by the 12th section, became liable to the sheriff under the *fi. fa.* The sheriff might have walked into the accountant general's office, and might have carried off the money or the check, only it would have been indecorous and a contempt of court to do so without the permission of the court. The court will prevent the sheriff from seizing without its permission, but will not withhold its permission, for it is the duty of this court to aid to enforce the judgments of courts of ordinary jurisdiction, provided the creditor has proceeded at law to the extent necessary to complete his title, (Ld. Red. Eq. Pl. 126, 188,) which this petitioner has done. Under circumstances precisely similar to the present, Lord Langdale, M. R., recognized the claim of a judgment creditor by staying the delivery of the accountant general's checks. *Robinson v. Wood*, 5 Beav. 388. Following out the same principle, the court will order the accountant general to deliver this check to the sheriff, or to permit the sheriff to take and seize it under the *fi. fa.*

P. Wood and Welford, in support of the order. The petitioner ought first to have obtained a judge's charging order, upon which he would have been placed by the act in the position of an assignee; and then he should have proceeded to get possession, not upon petition, but by filing his bill. *Whitfield v. Prickett*, 13 Sim. 259.

[*Lord Chancellor.* It was never intended by the statute to give the creditor the treat of a chancery suit, in order to get the benefit of a charge he has already got.]

But there may be numerous other parties having an equal interest

¹ The 12th section is as follows: "That by virtue of any writ of *fi. fa.* to be sued out of any superior or inferior court after the time appointed for the commencement of this act, or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes, (whether of the governor and company of the Bank of England, or of any other bank or bankers,) and any checks, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the person against whose effects such writ of *fi. fa.* shall be sued out; and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized, or a sufficient part thereof; and may and shall hold any such checks, bills of exchange, promissory notes, bonds, specialties, or other securities for money as a security or securities for the amount by such writ of *fi. fa.* directed to be levied, or so much thereof as shall not have been otherwise levied or raised, and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby if and when the time of payment thereof shall have arrived; and that the payment to such sheriff or other officer by the party liable on any such check, bill of exchange, promissory note, bond, specialty, or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be from his liability on any such check, bill of exchange, promissory note, bond, specialty, or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied."

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with the petitioner, and who ought, therefore, to be brought before the court.

[*Lord Chancellor.* Then they will be in an uncomfortable position, if Taylor gets possession of the check.]

Sequestration will not touch a chose in action; *Simmonds v. Lord Kinnaird*, 4 Ves. 735; and this is a chose in action, a mere debt, and cannot be charged. *Wood v. Wood*, 4 Q. B. 397.

[*Lord Chancellor.* If this were a mere debt it would be a different question; but it is not, the check has been drawn.]

The check was not drawn when the petition was presented, and there has been no supplemental petition.

[*Lord Chancellor.* That has happened which the petition contemplated. The petition stated that the accountant general was then about forthwith to draw the check; he has done so, and the petition prays he may deliver it to the sheriff.]

It is the duty of the sheriff to exercise his ingenuity to obtain possession of the check.

[*Lord Chancellor.* Then is it the duty of the court to assist him, or to stand in his way? He cannot sue *for* the check, but he can sue *upon* it. Give him the check, and he will do the rest.]

A creditor cannot levy execution on the purchase money of an estate, on the ground that the money is held by the purchaser as a trustee for the debtor. *Brown v. Perrott*, 4 Beav. 585. Here the court stands in the same position as the purchaser in that case.

[*Lord Chancellor.* *Robinson v. Peace*, 7 Dowl. P. C. 93, was a similar case.]

Bacon, in reply. We are content to have the petition treated as if it were now the 13th of January, when the check was not yet drawn. Previous to that date the court had declared the 500*l.* to be the property of Taylor. The only means by which he could derive benefit from that declaration was by means of an instrument called the accountant general's check. Then comes the petition, which prays that the check, when drawn, may be delivered up. The money is not a debt from the court to Taylor; consequently the rule of *Wood v. Wood*, that a debt cannot be charged, does not apply. But in February, when the vice chancellor's order was made, the check had been drawn. If it were in Taylor's pocket, nothing could stand in the way of the execution creditor; and the only obstacle is, that being in this court the sheriff cannot seize it without permission.

LORD CHANCELLOR. If this application fails, the legislature will have failed in accomplishing its intention. That intention was to give a judgment creditor power over the property of his debtor. The legislature has industriously attempted to effect this intention; but, as is often the case, has, in so doing, made a technical failure. The case stands thus: The petitioner is a judgment creditor; the judgment debtor is an annuitant entitled to arrears of an annuity, amounting to 500*l.*, secured in this court. Now, the 14th section of stat. 1 & 2 Vict. c. 110, empowers a judge to make an order charging

stock and shares of a judgment debtor. After the passing of that act, it was discovered that the 14th section did not comprise a particular case, viz., that of stocks or shares standing in the name of the accountant general. To meet this case, therefore, a second statute was passed, the 3 & 4 Vict. c. 82, by which it was enacted, that whenever any judgment debtor should have any estate, right, title, or interest, vested or contingent, in possession, remainder, or reversion, in, to, or out of any such stocks, funds, annuities, or shares as in the act mentioned, which then were or should thereafter be standing in the name of the accountant general of the Court of Chancery, or in, to, or out of the dividends, interest, or annual produce thereof, it should be lawful for a judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor. Therefore, it seems to me quite clear that it was the object of the legislature to make property of a judgment debtor, which was in such a position that an execution creditor could not lay hold of it, liable to the judgment. Now, this is a fund which it is quite clear the legislature intended to render so liable. The creditor, however, not finding it convenient to have recourse to the fund, did not apply under the provisions I have referred to, but having discovered that a check was about to be drawn by the accountant general, pursuant to the order of the 18th of November, he presents his petition to have the benefit of the order. That petition consists of three parts: that the accountant general may be ordered not to deliver the check to Taylor; that he may be directed to deliver it to the sheriff, or to allow the sheriff to take and seize it under the writ of *fi. fa.* The petition was presented before the check was drawn; the reason for presenting it was, that the sheriff would not commit a contempt of court, by entering the accountant general's office and seizing the check. Supposing there should be property in the possession of any officer of the court, which should turn out to be distinctly liable to be taken in execution by a creditor, or to be held for the sole and only benefit of any individual, it would not be proper to seize it without the order of the court. There might be circumstances rendering it unfit for the property to be interfered with without an order; and it is the proper and safe course to apply to the court for an order. This application is of that description. But in order that the court may not make an order blindly, inquiry is necessary into the facts relating to this check. In the case of a bill of exchange, the acceptance may be altered before delivery, but delivery out makes it binding; and in the case of a check, the drawee takes no property in the check till delivery. Now, what are the facts relating to this check? It was drawn and signed. From that time how does it remain in the office? It is simply to remain in the office till applied for, and then to be delivered out to the party entitled to it. It is then delivered to Chauntler as the attorney of Taylor. In Chauntler's hands, to whom did it belong? If Chauntler had lost it, could Taylor have maintained trover upon it? I think he could. Supposing it, then, to have been at that time the property of Taylor, has the property in the check

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been changed by subsequent circumstances? The order restraining the delivery of the check could not, it being Sunday, be extended. Chauntler, therefore, very properly returned the check. But does that alter the property in the check? If the party, having had a check in his hands, returns it, not with a view to any right in the drawer to rescind it, but to meet the claim of another, the drawer would not have a right to resort back and rescind it. The return of the check would not transfer the property in it back again to the drawer, and the drawee might bring an action of trover and recover it. By the first delivery of this check, it became the property of the drawee, and its being returned did not deprive him of his property. This check being, then, the property of Taylor, a judgment creditor asks liberty to take it, as being amenable to his judgment. I have looked to the nature of the property to see whether it is amenable, and I find it clearly of that description. It was clearly the intention of the legislature to make such property liable; and this court will not be astute to defeat the clear intention of the legislature. I think that, under the circumstances in which the check now stands, the terms of the prayer are unembarrassed, and that part of the prayer which asks that the sheriff may take the check may be granted. Should I err, I have this satisfaction, that I do so in endeavoring to carry out the act. The order of the vice chancellor of the 11th of February, 1851, must be discharged; the sheriff to be at liberty to take the check in execution.

THE NEWRY, WARRENPOINT, AND ROSTREVOR RAILWAY COMPANY v. MOSS.¹

May 13, 1851.

Liability for Calls.

The registered holder of shares in a railway company, though a mere trustee, is, in the absence of any special contract to the contrary, alone liable to the company for calls on such shares; and the company have no remedy in equity for calls against the real or beneficial owner of such shares.

THE bill in this cause was filed against John Moss and others, bankers at Liverpool, and John Evans, the personal representative of T. M. Sudlow, deceased, and it prayed that it might be declared that the said T. M. Sudlow was, at the time of his death, the holder of 510 shares of the capital stock of the company for the benefit of the defendants Moss & Co.; and that Moss & Co. were the real beneficial owners of the said shares, and the parties for whose benefit they were held by the said T. M. Sudlow, and as such were liable to the plaintiffs for the calls in arrear on the said 510 shares; and that an account might be taken of the said calls, and the interest due thereon; and that the

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defendants Moss & Co. might be ordered to pay to the plaintiffs what, upon taking the account, should appear to be due to the plaintiffs in respect of calls in arrear on the said 510 shares. The railway company was incorporated in 1846, and the bill alleged, that in the months of December, 1846, and January and February, 1847, Moss & Co., bankers at Liverpool, purchased or otherwise acquired the right to a large number of shares of the capital stock of the company, and took the transfers thereof from the sellers or transferors to and in the names of divers persons on their behalf, and for the benefit of them, the said Moss & Co.; and that Moss & Co. forwarded the deeds of transfer, together with certificates of the shares transferred, to the secretary of the company, with directions to register the deeds of transfer in the names of the defendants' nominees, with which directions the secretary complied: that one of the persons into whose name shares were transferred, as the nominee of Moss & Co., was the said T. M. Sudlow, who was their confidential clerk: that about 1600 shares were so transferred into his name, on the 24th of February, 1847, by parties of the names of Robert Parker, Charles Francis Cameron, John Hampson, and J. W. Watson, respectively: that Moss & Co., between the said 24th of February and 24th of June, 1847, sold some of the shares standing in Sudlow's name in the register of the company, whereby the number of registered shares in Sudlow's name was reduced to 905: that on or about the 24th of June, 1847, Moss & Co. received the sum of 214*l.* 14*s.* 9*d.* for interest paid by the company on these 905 shares: that, subsequently, Moss & Co. sold others of the said shares, and on the 27th of August, 1847, when the third call was made, there were standing in Sudlow's name 620 shares, on which the deposit and first two calls had been paid: that Sudlow died on the 6th of November, 1847, having appointed John Evans his executor, who proved his will: that since Sudlow's death, Moss & Co. had sold 110 shares, and procured from Evans deeds of transfer of such shares; and in order to enable such transfers to be registered, Moss & Co. paid the amount of the third and fourth calls on the said 110 shares, which were at the death of Sudlow in arrear, and thereupon the deeds of transfer of the said 110 shares were registered accordingly: that there were now standing registered in Sudlow's name in the books of the company 510 shares, on which the third, fourth, and fifth calls were wholly in arrear, with interest at the rate of 5*l.* per cent., and the plaintiffs had applied to Evans, as executor of Sudlow, for payment thereof, but he alleged that he had no assets of Sudlow for that purpose; and the plaintiffs, in May, 1848, commenced an action against Evans for payment of the calls, to which he pleaded *plene administravit*: that the plaintiffs had applied to Moss & Co., as the real owners of the 510 shares, and the parties on whose behalf they were registered in Sudlow's name, for payment of the calls remaining due, and interest, but they refused to pay the same. The bill contained various allegations and charges, to show that Moss & Co. were the beneficial owners of the shares. The case made by the answer of Moss & Co. was, that the firm had, in the way of their business as bankers, been in the habit of making, and had made, advances of moneys to share-

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brokers, for the purpose of enabling them to pay, on behalf of their principals, for shares in different railway companies, and in order to secure the repayment of such advances, with interest, the sharebrokers to whom such advances were made usually deposited with the firm the shares so purchased: that Charles Francis Cameron, a sharebroker at Liverpool, applied to Moss & Co., as bankers, and in the way of their business, to make advances to him in order to enable him to purchase shares in the said company, and the firm agreed so to do; and in December, 1846, and January, 1847, they accordingly advanced to Cameron, for the purpose of enabling him to purchase such shares on behalf of his principals or himself, but not on behalf of the firm of Moss & Co., various sums, amounting in the whole to 16,627*l.* 5*s.* 4*d.*, with which Cameron purchased 1760 shares in the said railway, and 1255 of such shares were, by the direction of Cameron, transferred by the vendors thereof into the name of Robert Parker, 220 into the name of Cameron himself, and 115 into the name of John Hampson, and the scrip or certificates for such 1760 shares were deposited with the firm of Moss & Co. by Cameron as a security for the repayment of the advances made to him, and interest: that at the time such advances were made by Moss & Co. it was intended that the sums advanced by them should be forthwith repaid, but in consequence of the shares declining in value, Cameron was unable to take up the said scrip or certificates, or to repay the advances so made to him; and in order to give the firm of Moss & Co. some security for the repayment of the said advances, Cameron agreed that a transfer should be made of 1410 of the said shares into the name of Sudlow, and accordingly the same were so transferred in December, 1846, and January and February, 1847, by the several individuals named in the answer; and Cameron agreed that Sudlow should stand possessed of the shares transferred into his name, subject to the payment of such advances and interest, in trust for Cameron: that the firm of Moss & Co. never had any other interest in or claim upon the shares, save as aforesaid, and as a security for the repayment of the advances made by them to Cameron, and interest thereon. They admitted the sale of 900 shares at different times, and the application of the proceeds in part discharge of such advances and interest; and they said, that inasmuch as the shares were to be and continue a security to Moss & Co. for their said advances, Sudlow, into whose name the 1410 shares were transferred, was nominated by them, and the transfer thereof was so far for their benefit, that the shares were to be a security to them for the said advances and interest, but, subject thereto, the same were to be and were held by Sudlow in trust for and for the benefit of Cameron, who was the real beneficial owner thereof, and entitled to redeem the same. They said that the 214*l.* 14*s.* 9*d.* paid for interest on the shares standing in Sudlow's name in June, 1847, was placed by Moss & Co. to the credit of Cameron's account with them, and in reduction of the debt due from him for such advances as aforesaid. They admitted also, that on the sale of the 110 shares sold by Evans, Moss & Co. made the requisite advances of money to Cameron to enable him to pay to the plaintiffs the third and fourth calls

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on such shares, and which he accordingly paid. They admitted that 510 shares were still standing in Sudlow's name, and they said that Cameron was the real owner thereof, although they were a security to the defendants for the balance due to them from him. The question discussed at the hearing was, whether, upon the case stated in the answer, the plaintiffs were entitled to enforce in equity payment of the calls in arrear on the 510 shares standing in Sudlow's name, against the defendants constituting the firm of Moss & Co.

Roupell and Anderson, for the plaintiffs.

Lloyd and Eddis, for the defendants.

The clauses in the Companies Clauses Consolidation Act, 1845, relating to the transfer of shares and enforcement of calls, were referred to.

SIR JOHN ROMILLY, M. R., said, that it did not appear to him that there was any liability for calls to the railway company on the part of persons who were only the equitable owners of shares. The clauses in the Companies Clauses Consolidation Act did not give any remedy against the equitable owner, to compel him to pay calls for which the trustee on the register was liable. The court had regard to the relative rights of trustee and *cestui que trust*, but such rights could only be enforced at the instance of the parties themselves. If Sudlow was a trustee for Moss & Co., he no doubt might have compelled them to make good to him any calls paid by him to the company; and Moss & Co. might, on the other hand, have enforced the beneficial use in the shares against him. But there was no relation of trustee and *cestui que trust* between the railway company and Moss & Co. Assuming that the railway company were, under the powers in their act, competent to contract in the same manner as other parties, there might have been an express contract between them and Moss & Co. that the latter should be liable for calls on the shares standing in Sudlow's name. Under that contract a new relation would have arisen, different from that under the clauses of their act of Parliament, and the laws relating to joint-stock companies. There was, however, no such contract, but it was the simple case of persons alleged to be the real or equitable owners of shares standing in the name of another party. The relation of trustee and *cestui que trust* was not established between the plaintiffs and the defendants; and there was no special contract to alter the laws existing between the company and the shareholders; and being of opinion that the person appearing on the register as the holder of the shares was alone liable for calls at the instance of the company, he thought the plaintiffs were not entitled to the relief they asked; and he dismissed the bill, with costs.

Ex parte Robinson; in re The Royal Bank of Australia.

*Ex parte ROBINSON; in re THE ROYAL BANK OF AUSTRALIA.*¹

March 25, 1851.

Joint-stock Companies Winding-up Acts — Executor — Contributory.

A director of a joint-stock banking company was the holder of twenty shares as a qualification for that office, and executed the deed in respect of them. The directors having subsequently agreed that each should take a number of additional shares, this director accordingly signed a letter agreeing to take 100 more shares, and gave a promissory note for them for 1000*l*. The deed was never executed in respect of these shares, nor were the shares themselves ever allotted. Debtor and creditor entries were made in the bank ledger concerning the dividends on the shares, and the interest on the note. The note, when due, was not honored. The master inserted the name of the executor of this director in the list of contributories in respect of the whole 120 shares, and, on appeal, his decision was affirmed.

In this case Mr. Joseph Phelps Robinson, who was a director of the company, took twenty shares as a qualification for the office, and in respect of those shares paid the deposit and signed the deed of settlement. At a meeting of the directors of the bank, held on the 7th of August, 1840, the question having been discussed, whether the bank was upon a sufficiently broad basis to carry on the extensive business which ought reasonably to be expected in the course of a few years, the directors agreed among themselves to fulfil their original promise at the formation of the bank, by rendering themselves responsible to take, either by themselves or through their friends, a number of shares within a certain period. It was then agreed, for the security of the bank, that a letter to the following effect be taken from such directors as agreed to accept this responsibility, and the following gentlemen signed the letter to the amount against such name:—

“To the Directors of the Royal Bank of Australia.

“Royal Bank of Australia, 2 Moorgate Street, }
London, August 7, 1840. }

“Gentlemen: In reference to the 500 shares in the Royal Bank of Australia which I agreed to take in order to extend and secure the basis on which the establishment shall be placed, I hereby bind myself, at such time or times within four years of the date of the deed of settlement as shall be convenient to me, to pay the deposits and calls on the said shares, with interest thereon at 5*l*. per cent., from the time appointed for the payment of the same, until such calls and deposits shall be paid by me.

“I am, gentlemen, your most obedient servant.”

Thomas Meux,	£500	John W. Sutherland,	£500
Alexander Cockburn,	100	William P. Crawford,	200
John Connell,	500	Joseph P. Robinson,	100
George Webster,	500		

Each of the gentlemen so signing addressed a letter to the directors,

¹ 15 Jur. 438.

Ex parte Robinson; in re The Royal Bank of Australia.

accepting the responsibility; that of Mr. Joseph Phelps Robinson being as follows:—

“Royal Bank of Australia, 2 Moorgate Street, }
London, August 7, 1840. }

“Gentlemen: In reference to the 100 shares in the Royal Bank of Australia which I agree to take in order to extend and secure the basis on which the establishment shall be placed, I hereby bind myself, at such time or times within four years from the date of the deed of settlement as shall be convenient to me, to pay the deposits and calls on the said shares, with interest thereon at 5*l*. per cent., from the time appointed for the payment of the same, until such calls and deposits shall be paid by me.

“I am, &c.,

“JOSEPH P. ROBINSON.

“To the Directors of the Royal Bank of Australia.”

Mr. Joseph Phelps Robinson accordingly gave a promissory note for 1000*l*., being 10*l*. a share, on account of the 100 shares. In the beginning of the year 1842 he went to Sydney, where he remained until his death. In 1847, the promissory note was sent out to Mr. Boyd, the manager of the bank at Sydney, but Mr. Joseph Phelps Robinson was not able to honor it. In the ledger of the bank, debtor and creditor entries were made in Mr. Joseph Phelps Robinson's account of dividends on the 100 shares, and of the 1000*l*. promissory note, and the interest thereon. In 1848, Mr. Joseph Phelps Robinson died, having appointed Mr. Anthony George Robinson his executor. Master Richards, the master charged with the winding up of the affairs of the bank, by his decision, made on the 25th of February, 1851, retained the name of Mr. Anthony George Robinson on the list of contributories for the 120 shares, as executor of the deceased. A motion was now made on behalf of the executor, that this decision might be reversed or varied, and that the name of the executor might be ordered to stand on the list in respect of the original twenty shares only. (The several clauses of the deed of settlement relating to executors are set out in the next case.)

Roundell Palmer and *Cairns*, for the motion, argued, that as the 100 shares were never allotted, nor the deed executed in respect to them, the master's finding was wrong.

Malins and *Daniel*, for the official manager, were not called on.

KNIGHT BRUCE, V. C. The master has treated the 100 shares on the same footing as the twenty shares. I cannot see how he could have done otherwise. I think this a very clear case, and refuse the motion, with costs.

Ex parte Meux's Executors; in re The Royal Bank of Australia.

*Ex parte MEUX'S EXECUTORS; in re THE ROYAL BANK OF AUSTRALIA.*¹

April 17, 1851.

Joint-stock Companies Winding-up Acts — Executor — Contributory.

Another director in the same company, having qualified in the same manner, and having agreed to take 500 additional shares under the same circumstances, as in the last case, and having given a promissory note for 5000*l.*, afterwards, and before the note became due, died, no shares being allotted. After his death his executors, in 1842, applied to the directors to know the number of shares held by him, and they were told twenty shares, which twenty shares the executors sold and transferred in due form. In 1843 the directors cancelled the 500 shares and the note:—

Held, that the executors were not properly on the list of contributories in respect of these 500 shares.

THE facts of this are similar to those in the last case, so far as the qualification for the office of director, the agreement to take shares, and the giving the promissory note are concerned. That document was in the following form:—

“London, October 2, 1841.

“Five years after date I promise to pay to the trustees of the Royal Bank of Australia the sum of five thousand pounds, with interest at the rate of 5*l.* per cent. per annum, value received.

“THOMAS MEUX.”

Mr. Meux died before the note became due, and his executors, the Rev. Thomas Maude and Mr. Alfred Turner, proved his will. The latter, on the 24th of February, 1842, addressed the following letter to the directors:—

“To the Directors of the Royal Bank of Australia, 2 Moorgate Street, Lothbury.

“32 Red Lion Square, Feb. 24, 1842

“I shall be obliged by your informing me, as executor of the late Thomas Meux, Esq., of Bloomsbury Square, what shares that gentleman held in your company, and whether there is any thing due to or from him in respect to them, as I wish, before proving the will, to ascertain the amount of Mr. Meux's property.

“I am, gentlemen, yours, &c.,

“ALFRED TURNER.”

To which the following answer was returned:—

“Royal Bank of Australia, 2 Moorgate Street, }
London, March 2, 1842.

“Sir: Your letter of the 24th ultimo, addressed to the directors, came before them this day at the meeting of the board, and in reply I am desired to state, that the late Mr. Meux held twenty shares in

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the Royal Bank of Australia of 50*l.* each, and on which 10*l.* per share has been paid.

"I am, sir, your most obedient servant,

"GEORGE H. WRAY.

"To Alfred Turner, Esq., 32 Red Lion Square."

Mr. Turner, on the 27th of July, 1843, applied to Mr. Wray as follows:—

"32 Red Lion Square, July 27, 1843.

"Sir: I shall feel obliged by your informing me if there is any, and what interest due and receivable on the shares of the late Mr. Thomas Meux, in the Royal Bank of Australia, to the executors, of whom I am one.

"I am, sir, your most obedient servant,

"ALFRED TURNER.

"To G. H. Wray, Esq.,

"Royal Bank of Australia, 2 Moorgate Street."

From the books of the bank the following evidence was obtained. In the general ledger, under Mr. Meux's name, there was this entry:—

"*Dr.*

"1841, December. To subscribed stock £5000

"1842, December. To bills receivable 5000

"*Cr.* £10,000"

"1841, December. By bills receivable £5000

"1842, December. By subscribed stock 5000

£10,000"

In the book of entries of the proceedings of the company, held in 1843, the following was found: "At a meeting of the Royal Bank of Australia, held on Wednesday, 29th of June, 1843; present, Messrs. Sutherland, M. Boyd, Connell, and Mitchell; the subject of the credit shares held by the late Mr. Meux was brought under the attention of the court, and, after full consideration, it was resolved, that they be cancelled." Signed, "J. W. Sutherland." The name of Mr. Meux to the promissory note was cancelled. The executors sold and duly transferred the twenty shares to a purchaser. Mr. Turner, in his affidavit sworn in the master's office, said he never received any information either from Mr. Wray or the directors respecting the 500 shares; and Mr. Wray in his examination said, "I was manager of this bank at the latter end of August, 1841; the late Mr. Meux was a director of the said bank from its projection. I received a letter from Mr. Turner, dated the 24th of February, 1842. I brought it under the consideration of the board on the 2d of March, 1842; they directed me to reply to it, and I wrote a letter on that day to Mr. Turner. I was present with the directors on the 24th of June, 1842, and, in pursuance of their directions, on that day cancelled Mr. Meux's signature to his promissory note, dated the 22d of October, 1841, for 5000*l.* I never had any communication with Mr. Meux's executors as to the

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note on the 500 shares." A motion was now made on behalf of the Rev. Thomas Maude and Alfred Turner, executors of Thomas Meux, deceased, that the decision of Master Richards, who was charged with the winding up of the above-named bank or company, whereby the names of the said Thomas Maude and Alfred Turner, executors of the said Thomas Meux, had been included in class 5 of the list of contributories in respect of 500 shares, might be reversed, and that the names of the said Thomas Maude and Alfred Turner might be struck out of the said list of contributories of the said bank or company. In reference to the deed of settlement, the master stated that it contained 128 clauses; that the late Mr. Meux executed it, and it appeared by the deed that he was a director of the company; that by clause 2 of the deed, the word "shares" is interpreted to mean shares in the capital for the time being; that clauses 3, 4, and 5 were as follow, viz.: 3. "That the capital of the company shall be 1,000,000*l.*, divided into 20,000 shares of 50*l.* each, and the proprietor of each share shall bring in and pay to the company the full sum of 50*l.* in respect of such share, as and when called upon so to do, in manner hereinafter provided, the sum of money previously brought in or paid in respect of the same share being allowed as part of such sum of 50*l.*; and the capital for the time being paid and brought in shall be used and employed in the business of the company, and each of the proprietors shall be entitled to the profits and liable to the losses of the company, in proportion to his shares." 4. "That the shares of the company shall be vested in the court of directors, who shall have full power to allot, appropriate, reserve for, or dispose of the same, to such parties, and upon such terms, and in such manner as they may think fit." 5. "That the court of directors shall cause the shares in the company to be numbered, and shall cause all such additional shares (if any) as shall be created under the provision herein in that behalf contained to be likewise numbered, and shall cause every share to be at all times distinguished by the same number by which it shall have been originally distinguished, notwithstanding any transfers or forfeitures which may have been made or taken place in respect thereof." That clause 10 was as follows: 10. "That the management of the company, and the business and concerns thereof, and the regulation, investment, and application of the properties, funds, securities, and money for the time being belonging to the company, and the regulation and determination of the modes and terms of carrying on and transacting the business of the company, and the other matters and things whatsoever connected with or relating to the business and concerns of the company, shall be solely and exclusively vested and reposed in the court of directors, except as herein excepted or otherwise provided." The master further stated, that by the 30th clause the court of directors might make rules for the disposition of the properties, funds, and securities of the company as they should think expedient and proper. That clause 47 was as follows: 47. "That the court of directors may alter, vary, or transpose the properties, funds, securities, or moneys of or belonging to the company, or any of them, or any part thereof, as they think fit, and may make and

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give such orders in regard thereto, and also for the sale and other disposition of the said properties, funds, securities, or moneys, or any part thereof, as to the court of directors shall seem meet." That the 50th clause empowered directors to forfeit shares where parties should not have paid their calls. That clause 88 was as follows: 88. "That, except where herein expressly provided, the person in whose name any share shall stand in the share register book shall to all intents and purposes be deemed, at law and in equity, the absolute and beneficial proprietor of such share, and the company shall not be bound or affected by any notice of any equitable claim thereto, or charge thereon." That clause 110 declared that the executor of any proprietor should not as such be a proprietor in respect of such shares, but he should be at liberty to dispose of them; or the company might, upon an executor giving notice, and complying with the provisions of the deed, become the proprietor, and personally chargeable; and that, by the 114th section, any executor who should refuse, after three months' notice, to execute the deed, was liable to the forfeiture of the shares.

Bacon and *Busk*, for the motion, referred to *Ex parte Cockburn*, (15 Jur. 28; 1 Eng. Rep. 139,) and *Ex parte Robinson*, (15 Jur. 438; *ante*, p. 38.)

Malins and *Daniel*, for the official manager, stated that the ground on which the master had placed the names of these gentlemen on the list of contributories was plain and intelligible, as well as fair and just. It was, that as the executors might have claimed the profits of the concern had it been prosperous, and had not the promissory note been cancelled, they ought to be liable for losses, that cancellation of the note being wholly unjustifiable on the part of the directors as against the shareholders.

Knight Bruce, V. C. How this case would have stood if Mr. Meux had continued to live, and had himself dealt and been dealt with, as his executors dealt and were dealt with, it is unnecessary to say; my opinion being, that the executors did not, in every sense and for every purpose, stand in the same position as Mr. Meux, the personal knowledge possessed by whom they had not. Again: I think it unnecessary to say whether, in the dealings between the executors and the directors, the latter exceeded the powers confided to them by the company or shareholders at large, because there are some cases in which, although an agent does exceed his authority, he binds his principal. There are of course many cases in which, exceeding his authority, he does not. The present, however, not being one of those cases, I think that if, in what the directors did, they exceeded their authority, the company are nevertheless bound. The facts are these: The executors of Mr. Meux, without any personal knowledge of the nature or extent of his connection with the bank, applied to the directors, or to the person who was conducting their affairs or representing them, to know what was the extent and what was the nature of that connection; and their answer, in substance and effect, although not

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in terms, was, that the extent of that connection was that Mr. Meux was the holder of twenty shares. This takes place in 1842. The executors act upon that information; they sell the shares, and consider — as they had a right to consider — their connection with the company as determined. More than seven years passed away, during the whole of which that mistake, if there was one, or misrepresentation, if there was any, was not corrected. Every thing goes on, on each side, on the footing of the accuracy of the representation made to the executors in 1842. In 1850, more than seven years afterwards, a petition is presented for the purpose of winding up the affairs of the company, and an order is made upon it. Then it is said by the official manager, on behalf of the shareholders, that this representation — that made by the agent — is to go for nothing, and that the executors are to stand exactly in the same position as they would have been if they had been told that the whole 500 shares had been allotted. I think that is against equity, if not against the law; and I cannot place the names of these executors upon the list of contributors. I dissent from the master's view.

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May 7, 1851.

Wesleyans — Mortgagee — Trustee.

H. and other persons were trustees of a chapel, upon trust to permit such persons to preach therein as were appointed by the conference of Wesleyan Methodists, and with powers to mortgage. They mortgaged the chapel to H. Afterwards a larger chapel was built, of which C. was a trustee, upon similar trust; and the new chapel was mortgaged to H. H. died, leaving C. his executor. C. and several other trustees, having quarrelled with the conference, formed, as was alleged, a scheme to wrest the chapels from the preachers appointed by the conference; and, accordingly, C., in default of payment, and in pursuance of his powers as mortgagee, put up the old chapel for sale, and it was sold to T., a trustee of the new chapel. C. also transferred the mortgage on the new chapel to L., who brought an ejectment. The preachers filed an information against all parties, alleging that the sale to T. was not valid or *bona fide*, and praying that the defendants might be restrained from allowing any persons to preach except those appointed by the conference, and that the ejectment might be restrained: —

Held, that C., though a trustee, had, as mortgagee, a title paramount, and both injunctions refused.

THIS case was argued for several days in the early part of the present term.

Sir W. P. Wood, S. G., Bethell, and Little, for the relators.

Stuart and Craig, for Hardy, Turner, and the trustees who were opposed to the conference.

Malins and Berkeley, for Hill.

¹ 15 Jur. 441.

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Rolt, for the conference, and for the trustees on the same side.

The case is fully stated and the principal arguments referred to in the judgment.

LOED CRANWORTH, V. C. This was an information at the relation of the Rev. William Worker and the Rev. George Badcock, and a bill by these same relators as plaintiffs, on behalf of themselves and all other persons entitled under the trusts of two several deeds of the 1st of July, 1814, and the 28th of October, 1837, mentioned in the pleadings. The defendants are the surviving trustees of both those deeds, together with certain other persons, whose interests in the matters in question I need not now advert to. The object of the suit is to establish both the above-mentioned deeds, and to restrain the defendants from doing certain things alleged to be in violation of the trusts thereby reposed in them. The material facts necessary for a due understanding of the case made by the information and bill are as follows: By a deed of the 1st of July, 1814, a certain chapel, then lately erected at Holt, in the county of Norfolk, was conveyed to a large body of trustees in fee, upon trust to raise, by mortgage of the premises, all such sums as had then been expended in purchasing and erecting the chapel, and all such further sums as should be necessary for keeping the premises in repair; and, subject thereto, upon trust to permit the chapel to be used exclusively by Methodist preachers duly appointed by the Methodist conference, holden annually, according to the provisions of a deed of the 28th of February, 1784, under the hand and seal of John Wesley, and duly enrolled in this court, being the deed organizing the body of persons commonly known by the appellation of Wesleyan Methodists. The deed of 1814 contains a proviso; that if at any time the major part of the trustees should be of opinion that a larger or more convenient chapel should be necessary, then they should sell the chapel thereby conveyed to any person willing to purchase the same. These are all the trusts which; for the present purpose, it is necessary to state. The funds applied for the purchase of the ground and the erection of the chapel appear to have been advanced chiefly by one of the trustees, William Hardy, but no security was taken by him for his advances till the year 1821. By an indenture of mortgage, dated in that year, the then surviving trustees, after reciting that William Hardy had advanced large sums in and towards the erection and completion of the chapel, amounting to 700*l.*, and that such advances had been made on an agreement that the repayment thereof should be secured as thereafter mentioned, demised the chapel to Jeremiah Cozens, a trustee for William Hardy, for a term of one thousand years, in order to secure to him the repayment of the 700*l.* and interest. On the 12th of November, 1833, Hardy signed a memorandum on the back of the mortgage, whereby he admitted the receipt of 350*l.*, part of the 700*l.*, so that the principal sum then remaining due was reduced to 350*l.* It was stated at the bar that this sum of 350*l.*, so acknowledged to have been received, was not, in fact, received by William Hardy, though, for the benefit of the chapel, he agreed to

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admit such to have been the case. I do not think this material. From the date of that memorandum, it must be taken that the debt was reduced to 350*l*. It seems that the number of Methodists at Holt increased materially between the years 1814 and 1837, and it became necessary or expedient for their accommodation to erect a larger and more commodious chapel, and accordingly, by an indenture, dated the 28th of October, 1837, a piece of ground, with a chapel then in the course of being erected thereon, was conveyed to a number of trustees, who agreed to stand seized thereof upon trusts corresponding with those contained in a deed of the 3d of July, 1832, being a deed whereby a chapel at Skircoat, in the parish of Halifax, in the county of York, was conveyed to trustees upon trust for the benefit of the society of Methodists at that place; which deed, having been settled with great care, has ever since been treated as the model on which all subsequent deeds have been framed, and the same is now commonly known and referred to as the "model deed." The only trusts of the model deed so incorporated with the deed of October, 1837, to which it is necessary to refer, are the trusts for permitting the use of the chapel by the preachers named by the conference, and trusts for mortgaging. Those trusts are as follows: Upon trust "from time to time, and at all times after the erection thereof, to permit and suffer the said chapel, or place of religious worship, with the appurtenances, to be used, occupied, and enjoyed, as and for a place of religious worship, by a congregation of Protestants of the said people called Methodists, in the connection established by the said John Wesley, as aforesaid, and for public and other meetings and services held according to the general rules and usage of the said people called Methodists; and from time to time, and at all times hereafter, to permit and suffer such person and persons as are hereinafter mentioned and designated, and such person and persons only, to preach and expound God's Holy Word, and to perform the usual acts of religious worship therein; that is to say, such person and persons as shall be from time to time approved, and for that purpose duly appointed, by the said conference of the said people called Methodists, from time to time held under the orders and regulations of the said in part recited deed poll" — that is, the deed of February, 1784 — "and also such other person and persons as shall be thereunto, from time to time, duly permitted or appointed (according to the general rules and usage of the said people called Methodists) by the superintendent preacher for the time being of the circuit in which the said chapel or place of religious worship shall for the time being be situated."

The other clause referred to is the clause of mortgaging, which is, — "And it is hereby declared that from time to time, and at all times hereafter, it shall and may be lawful, to and for the trustees for the time being of these presents, or the major part of them, to mortgage, and for that purpose to appoint, convey, and assure, in fee, or for any term or terms of years, the said piece of ground, chapel, or place of religious worship, hereditaments, and premises, or any part or parts thereof respectively, to any person or persons whomsoever, for secur-

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ing such sum or sums of money as may be requisite or necessary in or for the execution and accomplishment of the trusts and purposes of these presents, or any of them, according to the true intent and meaning thereof" — one of these purposes being the erection of the building — "nevertheless, it is hereby declared, that no mortgage or mortgages, nor any disposition whatever by way of mortgage, shall, at any time hereafter, be made of the said trust premises, or of any part or parts thereof, under or by virtue of these presents, unless such mortgage or mortgages shall in the aggregate amount to and cover the whole debts, or the aggregate amount of the whole of the debts, which, at the time of the execution of such mortgage or mortgages, shall be due and owing;" and the mortgagees are not bound to inquire into the necessity of the mortgage, and so on. These trusts do not, in truth, materially vary from the trusts created as to the old chapel by the deed of the 1st of July, 1814. William Hardy was not one of the trustees of this new chapel, but the funds for its erection seem to have been in great measure supplied by him; and by an indenture of the 26th of May, 1838, the trustees of the new chapel demised it to Joseph Colman, as a trustee for William Hardy, in order to secure to him a sum of 500*l.* therein, stated to have been then advanced for erecting the chapel. In point of fact, it appears from the affidavits that he really advanced considerably more than this amount, but he agreed to treat the advance as a sum of 500*l.* only. This mortgage was made in strict conformity to the trusts of the model deed, and so clearly gave to William Hardy, or rather to Colman, as his trustee, a valid mortgage title to the extent of 500*l.* It should be stated, that this sum of 500*l.* was made up in part by a transfer of 150*l.* from the debt due on the mortgage of the old chapel. A large part of the fittings and fixtures of the old chapel, estimated to be of the value of 150*l.*, were removed to the new chapel, whereby the value of the former was lessened by that sum; and it was, therefore, agreed by all the parties, that this should be treated as a payment to William Hardy of 150*l.*, on account of his mortgage on the old chapel, and an advance by him to the trustees of the new chapel. The whole sum thus advanced by William Hardy to the trustees of the new chapel (including the 150*l.*) was agreed to be taken as 500*l.*, and was secured by the mortgage to Colman. And, in further pursuance of this arrangement, Hardy, on the 5th of January, 1839, signed a second memorandum on the back of the mortgage deed of the old chapel, whereby he acknowledged to have received a further sum of 150*l.* in reduction of the original mortgage debt of 700*l.* On the same day, Hardy made a further advance of 100*l.* to the trustees of the new chapel, for which they, by an indorsement on the mortgage of 1838, agreed to execute to him a mortgage of the new chapel. The result of all these transactions was, that Jeremiah Cozens, the trustee named in the mortgage of the old chapel, became entitled to that mortgage as a security for a sum of 200*l.* due to Hardy, being the balance of the original sum of 700*l.*, after deducting therefrom the two sums of 350*l.* and 150*l.*; and Joseph Colman, the trustee named in the mortgage of the new chapel, became entitled to hold that

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mortgage as a security to Hardy for the two sums of 500*l.* and 100*l.*, making together 600*l.*

In this state of things, William Hardy died on the 22d of June, 1842, having by his will appointed his nephew, the defendant William Hardy Cozens Hardy, and Jeremiah Cozens, (who was the trustee of the mortgage of the old chapel,) his executors. They both proved his will; and on the 29th of January, 1849, Jeremiah Cozens died, having by his will made the defendant Hardy his executor. Hardy proved his will, and so became entitled to the mortgage term of 1000 years, created by the deed of the 7th of November, 1821, as well as the money thereby secured. He also became entitled, as surviving executor of William Hardy deceased, to the mortgage debt of 600*l.* secured by the term of 1000 years in the new chapel vested in Joseph Colman. Such being the state of the title to the property in the two chapels, it is important, in order to understand the nature of the complaint made by the information and bill, that attention should be directed to the general nature of the organization of the Wesleyan body, as it was finally settled by the deed poll of the 28th of February, 1784, to which I have adverted. According to the provisions of that deed, the whole body is divided, in its ultimate subdivisions, into small sections called classes, each presided over by a class leader. Several classes constitute a society; and several societies are united into what is called a circuit; and, lastly, several circuits constitute a district. The supreme governing authority of the whole is called the conference, which consists of a body of one hundred preachers, renewed by self-election whenever vacancies occur. The conference meets every year, in the month of July or August, and it then appoints preachers for the ensuing year, to preach in all the chapels throughout the kingdom. The conference, at its meeting in 1850, appointed the plaintiffs, Worker and Badcock, to be the preachers for the several societies in the Holt circuit, Worker being made the superintending preacher of the circuit. It appears that at the meeting in the previous year, namely, 1849, the conference had done certain acts which gave great offence to a considerable portion of the Wesleyan body, and caused a schism amongst them; and the information and bill alleges, that the great majority of the trustees of the new chapel at Holt, and both the surviving trustees of the old chapel, have taken part with that portion of the Wesleyan body which is dissatisfied with the conference, and are now designated by the title of the Wesleyan Reformers, and that, in order to advance their views in opposition to those of the conference, they have formed a scheme for wresting from the preachers appointed by the conference both the old and the new chapel, and devoting them to other ministers nominated by themselves. The information alleges, that this scheme, so formed, was general, extending not only to the two chapels at Holt, but to all other Wesleyan chapels where the congregation was dissatisfied with the proceedings of the conference. I should have stated, that, since the erection of the new chapel, the old chapel has still been retained for the purpose of being occasionally used for religious services on week days; and also it has been used as a school-room; and a small income of about

5*l.* per annum has been derived by allowing it to be used at times by schools of other societies, not forming part of the Wesleyan connection. The two sole surviving trustees of the old chapel (being the defendants Johnson and Curtis) are also trustees of the new chapel, and the trustees of the latter have also acted (so far as any thing was to be done) as trustees of the former. Indeed, the only duty to be performed, as to the old chapel, was to see that it was kept in proper repair, and was used only for the purposes of the preachers, and the schools, and to receive the small annual sum paid for the occasional use of it by the other schools. The defendant William Hardy Cozens Hardy has, for a long time, been the principal acting trustee and treasurer, and, in that character, has had the receipt and expenditure of the funds, and he has taken part warmly with the seceding body of Wesleyan reformers. The plan for carrying into execution the object of ejecting the conference ministers is stated to have been suggested by Hardy, and is this: Most of the Wesleyan chapels, like those at Holt, are subject to heavy debts, secured in general by mortgages of the chapels. Mr. Hardy, in a letter inserted in the Wesleyan Times, (a paper friendly to the party calling itself the Wesleyan Reformers,) in February, 1850, suggested, that, if the mortgagees would enforce their claims, they might, in general, obtain possession of the chapels by a title independent of that of the trustees, and then they might put in their own preachers without reference to the authority of the conference.

In pursuance of this scheme, Hardy, in the month of May, 1850, applied to Curtis, one of the two surviving trustees of the old chapel, and claimed payment of the 200*l.* remaining due to him on the mortgage of the 27th of November, 1821. The money was not forthcoming, and on Saturday, the 8th of June, 1850, an advertisement appeared in the Norfolk News, announcing that the old chapel would be sold by auction, at Holt, on the Friday next following, i. e., Friday, the 14th. On that day it was accordingly put up for sale, and sold to the defendant Turner for 200*l.* Turner has since paid that sum to the defendant Hardy, in discharge of the mortgage, and the old chapel has since been conveyed to him by Hardy, as mortgagee, and by Curtis and Johnson, as the two surviving trustees in whom the legal fee in the old chapel was vested under the deed of the 1st of July, 1814. All the parties to this transaction, that is, Hardy, Curtis, Johnson, and Turner, are trustees of the new chapel, and are defendants to this suit, and they all take part with the Wesleyan reformers. Since the conveyance of the old chapel to Turner, it has been used, with the sanction of Hardy and the majority of his co-trustees, for the purposes of the rival ministers, preaching in opposition to and in defiance of the conference, and in a mode wholly at variance with the trusts of the deed of the 1st of July, 1814. With respect to the new chapel, the facts alleged in the information are, that in the month of September, last, the defendant Hardy demanded payment of the money (600*l.*) secured to him by the mortgage term vested in Colman, and default having been made in payment, he afterwards procured the defendant Hill to pay off the mortgage, and

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to take a transfer of it to himself; and Hill, in the beginning of the present year, brought an action of ejectment to recover possession of the new chapel.

In this state of circumstances, the present information and bill was filed on the 18th of February, in the present year, and the object of the prayer is, that the right of the plaintiffs, Worker and Badcock, to the use of the two chapels may be established; and, for this purpose, it prays, among other things, that the defendants, the trustees of the old and new chapels, — they are very numerous, I need not enumerate them, — may be restrained by the order and injunction of the court from further preventing and interrupting the use and enjoyment of the chapel and premises at Holt, in the county of Norfolk, comprised in the indenture of the 1st of July, 1814, in the information and bill mentioned, — that is, the old chapel, — “for the purpose of preaching and expounding God’s Holy Word, and performing any other act of religious worship therein, by the plaintiffs, the said William Worker and Robert George Badcock, during the continuance of their appointment by the conference of the people called Methodists, or, after the termination of such appointment, by other than the persons who may be hereafter duly appointed by the said conference, for the like purposes, or by any other persons duly authorized, with the consent of the plaintiff, the said William Worker, as the superintendent preacher of the Holt circuit, in the said information and bill mentioned, or of the superintendent preacher for the time being of the circuit within which the said chapel and premises are or may be situate; and that the said defendants” — enumerating them all — “may be restrained, in manner aforesaid, from permitting or allowing any person or persons whomsoever to have the use and enjoyment of the said chapel and premises comprised in the said indenture of the 1st of July, 1814, on any occasion, for the purpose of preaching and expounding God’s Holy Word, or performing any act of religious worship therein, other than and except the said plaintiffs, or other the persons for the time being appointed as aforesaid by the conference, or such other persons as may have been duly authorized by the plaintiff William Worker, or by other the superintendent preacher.” And then, that the defendants may be restrained from conveying the old chapel to Mr. Turner, — that, it was admitted, it was idle to pray for, because it had been already conveyed, — and, “that the defendants Curtis and Johnson, the surviving trustees of the old chapel, and also the defendant Mr. Hardy and the trustees of the new chapel, may be restrained from further or otherwise acting, or assuming to act, in the trusts of the indenture of the old chapel of the 1st of July, 1814.” Then it prays, also, that the defendants, the trustees of the new chapel, “may be restrained, in manner aforesaid, from further or otherwise acting, or assuming to act, under the trusts of the indenture of the 28th of October, 1837,” — that is the deed constituting the trusts of the new chapel, — “and that the defendant Hill may be restrained, in manner aforesaid, from continuing or proceeding with his action of ejectment, in the information and bill mentioned, and from otherwise proceeding to recover the possession of the said

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several trust premises in the information and bill mentioned, or any part thereof."

A motion was made before me in the language of this part of the prayer, and was fully argued at the beginning of this present term. I have since fully considered the subject, and am now prepared to give my judgment. With respect to the old chapel, the argument on behalf of the relators was, that Turner, the purchaser, bought with full notice of the title of the vendors, and of the trusts on which the property was held by them; that the deed of the 1st of July, 1814, did not, under the circumstances, authorize a sale at all; for though the trustees of that deed had power to sell, for the purpose of raising money to enable them to purchase a larger chapel, yet, that when such larger chapel had been already obtained from other resources, the trustees had no longer the power, after the lapse of many years, to sell, when the object for which the sale had been authorized had been already accomplished by other means.

It was further argued, that even if there was a power to sell, yet the sale to Turner could not be sustained, the same having been made on an unreasonably short notice, and under circumstances which showed that it was not made *bona fide* for the purpose of obtaining the best price in the market. I do not, in the view which I take of this case, feel myself called on to express any opinion as to the validity of this sale, because, whether it was or was not valid, certainly the transaction gave to Turner all the title which had previously been vested in Hardy as mortgagee. At the time of the sale he had in himself the legal title to a term of one thousand years in the old chapel, by way of security for the sum of 200*l*. Turner, on the sale, paid that sum to him, and he concurred in the conveyance to Turner, so that whatever rights were possessed by Hardy prior to the sale were effectually transferred to Turner; and I am of opinion that Hardy, as mortgagee, had a right to assert a title adverse to the trust, and that he, or any one claiming under him by virtue of that title, had the right to use the chapel for any purpose he might think fit, without being at all bound by the trusts of the deed of 1814. The defendant Hardy, it must be observed, is not, nor ever was, a trustee of the old chapel. But it was contended that the trustees of the new chapel so mixed themselves up with the trusts of the old chapel as to have taken on themselves the character of trustees of both. Supposing this to be so, still the trusts affect the equity of redemption only. For when the deed of the 1st of July, 1814, creating the trusts, gave power to raise money by mortgage, it of necessity gave power to create a title paramount to that of the trustees, and, as incident to that title, the right to use the chapel in any way, whether in conformity or in opposition to the trusts of the deed. The power of mortgaging was, in fact, exercised by demising, for a term of years, to a trustee for William Hardy deceased, by whom the chief part of the funds for establishing the first chapel were provided; and his title to the money, as well as the legal title to the land, became afterwards vested in the defendant Hardy. It was contended, that whatever might have been the case of a mortgagee who

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was a stranger to the trusts, yet that William Hardy deceased, who was the most active trustee of the old chapel, could not, in the character of mortgagee, act in a manner not conformable to his duty as trustee. I do not feel the force of this argument. It was necessary to raise money by mortgage, for the purposes of the trusts, and that the money should be advanced by one of the trustees was natural and quite proper. It may be that, in taking the account of what is due to him on his security, the parties interested in the trust of the deed may not be bound by the statement of the sum said to be advanced. In taking the account, there may be various equities arising out of the character of the defendant William Hardy Cozens Hardy as trustee, or as representing William Hardy deceased, the original mortgagee, which would not attach on a mere stranger. But this goes only to the question of the amount due, and not to the right of insisting on the character of mortgagee. In truth, it is not suggested that the whole 200*l.* is not due; and, on the contrary, it seems probable that, but for the voluntary abandonment by William Hardy of a great part of his demand, a much larger sum would be due to those who are now clothed with his rights. But be that as it may, the defendant Hardy, as representing William Hardy deceased, had a right to insist on his title as mortgagee, until the full amount due to him, whether it were more or less than 200*l.*, was duly paid; and that right having been transferred to Turner, the relators and plaintiffs, as claiming title under the trusts of the equity of redemption, cannot obtain any relief except on the ordinary terms of redeeming the mortgagee. It is proper that I should advert to a case referred to, but not much relied on, by the solicitor general, namely, the *Attorney General v. Monro*, 9 Jur. 461. That was an information seeking to restrain the trustees of a Scotch Presbyterian meeting-house at Manchester from permitting it to be used for any purposes not warranted by the trusts of their deed of settlement. A motion was made to restrain them accordingly. The trustees resisted the motion, on the ground, among other things, of certain adverse titles existing in third parties, and transferred to the defendants, the trustees, or some of them, and under this alleged title paramount they sought to act in a manner not warranted by the trust. Knight Bruce, V. C., would not listen to this defence; but the ground on which he went was, that the parties entitled, if they were entitled, to an adverse interest, had so conducted themselves as to lead those who were expending money in building the chapel to suppose that no such adverse title existed, or would ever be enforced against the trustees. Every one must at once assent to the justice of that decision, and the soundness of the principle on which it rested. But the facts before me are such as to make the principle on which that case proceeded wholly inapplicable. So far from there having been any conduct here, on the part of the mortgagee, leading to the inference that he did not mean to insist on the mortgage, it is part of the case made by the plaintiffs that interest was regularly paid every half year up to the time of the conveyance to Turner. No other authority was cited on this part of the case; and the conclusion at which I have arrived is, that the

defendant Hardy had a right to set up his title as mortgagee, and that whatever right he had is now vested in Turner, and so that I have no right to give any relief against him, except on a bill to redeem, offering to pay what is due. Whether, on such a bill, the plaintiffs would be entitled to relief, must depend on the question, whether the sale was a valid sale, according to the trusts of the deed of the 1st of July, 1814. If the sale was valid, then under no circumstances can the plaintiffs have the relief they are seeking. If it was invalid, then they may get relief on a bill offering to redeem, but not otherwise. In this suit there is no such offer, and so it is not important to inquire whether the sale was or was not valid. This disposes of the relief sought by the motion, so far as regards the old chapel. The same principles precisely must govern my decision as to the new chapel. The defendant Hardy had a right to assign over his mortgage to Hill. There was something like an attempt to mislead the plaintiffs, in the representations made to them in the latter part of the last year, relative to the transfer to Hill; at all events, something like mystery in a transaction where nothing ought to have been concealed or misrepresented. In fact, however, the mortgage was eventually transferred to Hill; and on the grounds which I have already explained as the foundation of my judgment relative to the old chapel, I think that Hill had a perfect right to assert his title as mortgagee, and to bring an ejectment to obtain possession. I do not shrink from going the full length of saying, that I think Hardy himself, and his trustee, might have done so, and therefore, of course, Hill may do the same. In order to stop execution on the ejectment, I understand that the 600*l.* was brought into court, on an arrangement that it should be dealt with as I might think right, and as if Hill had regularly moved to have the money paid out to him. If there had been no such arrangement, I could have done nothing but refuse any injunction restraining Hill from taking possession; and, therefore, all I can now do is to order that possession be given to him, unless the plaintiffs agree that the 600*l.* shall be paid out to him. If this is done, Hill may be dismissed from the cause; and of course, in taking the account against Hardy, he will be chargeable with all the sums come to his hands as trustee, and which he ought to have applied towards the liquidation of the mortgage. If the plaintiffs prefer it, they may still retain Hill as a defendant, and then he, as well as Hardy, will be responsible for any portion of the 600*l.*, which, on taking the whole of the account, Hardy could not have claimed against those by whom he may be redeemed. The only relief asked by the motion is, that the defendant Hardy, and the other defendants, trustees of the new chapel, who acted in concert with him, may be restrained from further acting as trustees in carrying into execution the trusts of the deed of October, 1837. This is asked, as to the defendants Hardy and Colman, on the ground that they have been duly expelled from the society of Methodists, and so that, either by the express stipulation of the model deed, or if those provisions are inapplicable, then on general principles of expediency, they are incapacitated from any longer executing trusts for the benefit of a

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religious community with which they have no connection, and so may fairly be supposed to have no sympathy.

And further, as to all these defendants, it was argued that their conduct in encouraging and assisting the scheme for putting the chapel into the hands of mortgagees, and so defeating the objects of the deed of which they are trustees, is of itself sufficient to show their unfitness for the discharge of duties which it has thus been their object to thwart, and, in fact, that they must be considered as having voluntarily withdrawn from the society. With respect to the argument derived from the expulsion of Hardy and Colman, I think it is a sufficient answer to say, that they dispute the validity of the acts by which they are expelled; and, on looking at the rules of the society, I confess it seems to me at least doubtful whether they are not right. At all events, neither on this ground nor on the more general ground of unfitness, applicable to all the trustees who take part with Hardy, is there any such urgency as to warrant me in interposing by a summary remedy before the cause is brought to a hearing. The only conduct complained of as an alleged breach of trust is the fact of the trustees having more or less assisted Hardy and Hill in enforcing their mortgage. That question being disposed of, I do not find any other breach of trust suggested as likely to occur, rendering summary interference necessary; and therefore, though at the hearing it may, as I have already stated, be very expedient to appoint new trustees in the place of persons whose conduct, though not, as I think, amounting to a breach of trust, clearly indicates a total want of sympathy with the feelings and interests of those of whose rights they are the guardians, yet I do not see any ground warranting me in interfering on motion. The result is, that I shall dismiss this motion; but, under all the circumstances, I shall make no order as to the costs. My view of the case has rendered it unnecessary for me to consider the question, whether this record is so framed as to entitle the plaintiffs to sue at all; and as to that part of the argument, therefore, I desire to be understood as not having expressed my opinion at all.

His lordship afterwards observed: The motion is dismissed *simpliciter*; but with regard to Mr. Hill's possession of the new chapel, that is to be delivered to him, because the judgment was to be disposed of as I should direct; and, unless the parties consent to his having out of court the 600*l.*, he will take possession of the chapel. If they agree to pay him his costs, he may be dismissed.

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May 8, 1851.

Claim — Parties — Representatives of deceased Executor — Administration — Account — Orders 8 and 13 of April, 1850.

Claim for a legacy, but involving an account of the general estate of the testator, will not lie against the surviving executor of the testator alone, but requires the presence of the representatives of the deceased executor as parties.

A discretion is reserved, by the orders of April, 1850, to the court, at the hearing, to give or refuse relief, or to direct inquiries, having regard to the parties then before it.

Meaning of the words "in the first instance," in the 8th order of April, 1850.

Claim for a legacy, involving the general administration of the testator's estate, and requiring the direction of accounts and inquiries of a very special character, dismissed, the court holding, that a bill was the proper form of proceeding.

The decisions of Lord Langdale in *Perry v. Knott*, 5 Beav. 293, *Kellaway v. Johnson*, Id. 319, and other cases of that class, observed upon.

THIS was a claim for payment of a legacy, under the following circumstances: The testator, a farmer, by his will, dated in July, 1817, directed his debts and funeral expenses, in the first place, to be paid by his executors, to whom he bequeathed all his personal property, upon trust, thereout to pay his son William the sum of 100*l.* at twenty-one, with the interest in the mean time; to his daughter Ann 200*l.* at twenty-one, with the interest thereon in the mean time; and to his daughter Jane a like sum of 200*l.* at the like age, with the interest thereon in the mean time. The testator then directed, that, with the remainder of his estate, his executors should continue his wife, and such of his children as should be living with him at the time of his decease, upon the farm then occupied by him, for the equal benefit of each of them, so long as they should keep single; but if any of the said children should marry, then he, she, or they, so married, should depart, leaving his, her, or their mother, with the other children, in peaceable possession of the said personal estate; and, upon further trust, when his youngest daughter, Jane, should have attained the full age of twenty-one years, that they, his said trustees, should cause all his said personal estate to be valued, and out of the said property should place the sum of 400*l.* on such security as they, or counsel learned in the law, should advise, for the use of the testator's wife, Ann Penny, for her life, and at her decease should divide the said sum of 400*l.* among the testator's children, Ann, Sarah, John, Joseph, Jane, George, and William, or their lawful issues; but if any of the said children should die, leaving no lawful issue, then that his, her, or their respective shares should be divided equally amongst the survivors of them, or their lawful issues. Lastly, the trustees and executors were to divide all the remainder of his personal estate equally amongst all his children. The claim was filed by one of the seven children interested in the legacy

¹ 15 Jur. 445.

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of 400*l.*, stating that part only of the will which contains the bequest of the 400*l.*; stating, also, that the testator died in 1817; that the will was duly proved by the executors named; that the testator's daughter, Jane Penny, attained the age of twenty-one years in 1832; that his widow died in July, 1845; that the defendant was the sole executor of the testator's will, having survived both his co-executors; and that the plaintiff was entitled, as legatee under the will, to the amount of one seventh part of the said sum of 400*l.*, and to interest thereon at 4*l.* per cent. from the day of the decease of the testator's widow. The claim asked for payment of the said legacy and interest, and in default, to have the personal estate of the testator administered by the court, on behalf of the plaintiff and all other legatees of the testator. The defendant, by his affidavit, filed in opposition to the claim, deposed that, at the testator's death, his personal property amounted in the aggregate to 1562*l.* 4*s.* 10*d.*; that certain payments, amounting to 224*l.* 6*s.* 8*d.*, having been made thereout, in payment of the testator's debts, funeral expenses, &c., a balance of 1337*l.* 18*s.* 2*d.* was left; that this constituted the only fund out of which the sum of 770*l.* and interest, owing by the testator, upon promissory notes, at his death, and the legacies, amounting to 500*l.*, given by the will, in priority to the said legacy of 400*l.*, were payable; that if these sums had been paid in full, as directed by the will, a surplus of 67*l.* 18*s.* 2*d.* only would have been left for carrying on the farm. The affidavit then stated, that, after the death of the testator, his widow and such of his single children as were living with him at his decease continued to reside upon the farm until the death of the widow in 1845, and that those who then remained single had ever since continued to reside thereon; that the debts due on the notes, and the legacies given in priority to the 400*l.*, had been paid, with the exception of one of the legacies of 200*l.*, and one of the notes of 200*l.*; that from the death of the testator till his youngest child attained twenty-one in 1832, the cultivation and management of the farm was carried on by means of such part of the personal estate as had not been applied in payment of his funeral and testamentary expenses, debts, and legacies, and that the farm had by this means, and by the personal labor of the children resident thereon, been duly and properly managed, without waste or extravagance, and the widow of the testator supported thereby, the children receiving no wages or emolument for their services, further than their maintenance and clothing. The affidavit also stated, that at the majority of the youngest child, the testator's personal estate, including the stock on the farm, was valued; that the full amount of the valuation was 527*l.* 18*s.* 6*d.*, and that there still remained due, in priority to the legacy of 400*l.*, a debt of 210*l.* due to the landlord for rent, a sum of 200*l.* due on one of the notes, and 200*l.* for a legacy given in priority to the 400*l.*, and that there was no personal estate left to answer the 400*l.* At the hearing of the claim,—

Rolt and *Westoby* appeared in support of the claim.

J. Bailey, for the defendant, objected that the case was a contested

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one. The debts and legacies prior to that claimed were alleged to exceed the amount of the assets. The case was not one which could be dealt with by claim. A bill was the proper form of proceeding. At all events, the personal representatives of the deceased executor ought to have been made parties to the claim. The accounts would involve a general administration of the estate, having regard to the directions contained in the will as to the carrying on of the farm, and to the general state of the assets. Where the suit involved the administration of the estate, every body liable to account must necessarily be required as a party on the record. The 32d order of August, 1841, which enabled parties to proceed against one or more of several parties jointly and severally liable, exclusive of the others, had been held not to be applicable to the case of an administration suit. *Kellaway v. Johnson*, 5 Beav. 319. *Perry v. Knott*, Id. 293. *Biggs v. Penn*, 4 Hare, 469; s. c. 9 Jur. 368. *Shipton v. Rawlins*, 4 Hare, 619.

Roll, in reply. First, with regard to the proper form of proceeding. The claim is for a small amount; it asks only for one seventh of 400l. The old form of proceeding by bill and answer, which required to be taken in the presence of all parties interested in the subject matter of the suit, though theoretically perfect, was applicable only to suits for large estates, the amount of which was considerable as compared to the amount of costs incurred in the suit. It became ruinous, however, when applied to small estates. To facilitate the settlement of questions arising upon small estates, these proceedings by claim were authorized. By the terms of the 8th order of April, 1850, that person against whom direct relief is prayed is the only one whom it is necessary to name on the claim in the first instance; that is, in cases like the present, the surviving executor. He, in the ordinary course of things, may be considered as in possession of the assets; he is the party primarily liable; he may possibly show that assets have been received by his deceased executors, and not accounted for; but the claimant has a right under these orders to sue him in the first instance as the party primarily liable, leaving to him the task of recovering over against his co-executor or his estate. Relief may, by means of these orders, be enforced against him if he have assets; or if the assets are outstanding, he will be compelled to get them in. Outstanding assets will be regarded as assets unadministered in his hands. If it turn out that relief cannot be had as against him, other parties liable may be added to the record afterwards if necessary. This view of the case is strengthened by the language of the 18th order of April, 1850. By that order the claimant is enabled to get, by writ of summons, at the other parties liable to account. By means of the machinery of that order the record may be perfected at any stage of the proceedings. It is not necessary that it should be perfect in the first instance. It has been said that this is not a proper case for a claim, inasmuch as, if a bill were filed, the defendant has a defence. It is submitted that the mere allegation of the defendant, that there is a ground of defence, is insufficient to prevent a proceeding by claim.

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SIR G. TURNER, V. C., said, that, in giving his opinion upon the case, it was not his intention to lay down any general rule as to what might or might not be considered as falling within the jurisdiction as to claims created by the orders of April, 1850. To do so would be inconvenient, as it would tend to fetter the discretion which it was the intention in framing those orders to reserve to the court. The intention of reserving a discretion to the court in all those cases was, he thought, manifested by the language used in the 13th order. That order ran thus: "At the time appointed for showing cause, upon the motion of the plaintiff, and on hearing the claim, and what may be alleged on the part of the defendant, or upon reading a certificate of the appearance being entered by the defendant, or an affidavit of the writ of summons being duly served, the court may, if it shall think fit, make an order granting or refusing the relief claimed, or directing any accounts or inquiries to be taken or made, or other proceedings to be had, for the purpose of ascertaining the plaintiff's title to the relief claimed; and further, the court may direct such (if any) persons or classes of persons, as it shall think necessary or fit to be summoned or ordered, to appear as parties to the claim, or on any proceedings against the master, with reference to any accounts or inquiries directed to be taken or made, or otherwise." He thought, upon the terms of that 13th order, it was evidently intended to reserve to the court a discretion, at the hearing of the claim, either to grant or refuse relief, or direct inquiries, according as the court might or might not think, upon the facts before it, that justice could ultimately be done between the parties before it at the hearing. For the plaintiffs it had been argued, that the orders must be taken to have been intended to enable the plaintiffs to proceed at once against a surviving executor, in the absence of the personal representatives of the deceased executor. He was of opinion that could not have been the intention of the orders. Had such been the intention, he thought it would have been more pointedly referred to in the orders, having regard to the decisions which at that time had been pronounced upon the construction of the 32d order of August, 1841. Prior to the issue of the orders upon claims, the question had been frequently under the consideration of the court, whether under the 32d order of August, 1841, an administration suit could be maintained against one of several executors in the absence of the others, or of the personal representatives of those who were dead. It had, in several cases, been determined by the court, that the 32d order of August, 1841, did not apply to such a suit. If the orders of April, 1850, had been intended to alter that state of the law, there would, he thought, have been some express provision inserted for the purpose.

It appeared, therefore, quite open to the defendant to take the objection, at the hearing, that the personal representative of the deceased executor was a necessary party to the proceedings on the claim. With regard to the decisions of Lord Langdale, upon the application of the 32d order of August, 1841, to the case of trustees jointly liable, it appeared to have been doubted by Knight Bruce, V. C., whether the conclusion arrived at by Lord Langdale was quite

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accurate; and he would observe that he concurred in that doubt. Those decisions had proceeded uniformly upon an impression entertained by Lord Langdale, that there were very few instances in which questions of contribution could arise. Lord Langdale said, that there had scarcely been a single instance within his recollection where one trustee, having been made liable, had afterwards sued his co-trustee for contribution. His lordship said, that, on that ground, the proper construction to be put upon the 32d order was, that it was not necessary that all the trustees should be made parties. He said that the remedy might always be enforced against one only of several trustees, and that the only reason for having them all parties in a suit in this court was, that they might be bound by the accounts, and that it might not be necessary to open the accounts in any subsequent suit for contribution. As suits of contribution were, however, extremely rare, his lordship thought that the proper construction of the order was to dispense with the presence of all the trustees, and to allow one out of several to be sued in the first instance.

The question then was, whether, in the present case, the objection taken by the defendant as to the absence of the representatives of the deceased executor was well founded. He was of opinion that it was, and that it should be upheld. Then came the question as to the proper mode of dealing with the claim. Should leave to amend be given, so as to introduce the representatives of the deceased executor? or was the case one in which the proper form of proceeding was by bill instead of by claim? He was of opinion that an amendment, by the mere introduction of the representatives of the deceased executor as parties, would not perfect the claim before him. The testator had directed certain legacies to be paid out of the estate, and that the residue should be employed in carrying on the farm until his youngest child should attain her majority. The whole property was then to be valued, and after the appropriation of 400*l.* thereout, upon the trusts under which the claimant's demand arose, the residue was to be divided amongst the testator's children. In directing the accounts, therefore, the common account of the personal estate of the testator would not suffice to meet the case; but it would be necessary to include in the decree, in some terms, and against some parties, an account of the personal estate employed in carrying on the farm, according to the directions of the testator. Great difficulty would arise in carrying out the decree, having regard to the consideration with whose assets the trade had been carried on.

The case represented by the defendant was, that at the death of the testator the excess of the assets over the aggregate amount of the debts of the testator, and the legacies given by the will in priority to the 400*l.* in question upon the claim, amounted to 67*l.* 18*s.* 2*d.*, and that that sum was all that would have remained to carry on the farm, had such debts and prior legacies been paid. If that were the true state of the case, the trade must have been carried on with the assets of those parties who were entitled to the personal estate in priority to the demand upon the claim. One question would be, What account should be directed, having regard to that fact? It was

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also stated by the defendant, that while the farm had been carrying on, several of the children of the testator had been employed in, and supported out of the produce arising from, the management of such farm. Another question would be, What allowances should be made in respect of such employment, and to whom? It was evident, therefore, that an inquiry would have to be directed in respect of the carrying on of the farm, independently of the question, whether the accounts were to be directed as against the executors, or as against the parties in whose hands the testator had directed the personal estate to be left for the purpose of carrying on the trade. As a foundation for any special directions as to the carrying on of the trade, the court would be compelled to require a clear statement of the facts connected with such carrying on.

It had been suggested by Mr. Rolt, that the suit might be worked out by means of inquiries under the decree. He (the vice chancellor) had felt the difficulty, in a late case before him, on the subject of directing inquiries without a statement of specific facts upon which to ground those inquiries. No such specific facts appeared upon the claim before him. The claim did not refer to any of the circumstances under which the farm had been carried on, nor even claim an account in respect of the management of the farm. He thought that, in that state of circumstances, a proceeding by bill rather than by claim should have been adopted, and that the proper order to make would be to dismiss the claim, without prejudice to a bill being filed. The orders of April, 1850, were not intended to apply to such a case. As to the observations of Mr. Rolt upon the 8th order of April, 1850, the words of that order were, "In other cases, the only person who need be named in the writ of summons as defendant in the suit *in the first instance* is the person against whom the relief is directly claimed." Without intending to give a conclusive opinion as to the meaning of the words "*in the first instance*," occurring in the order, he was inclined to think the meaning was, to enable the claimant to proceed against one party in the first instance, and then, if the court required the presence of others, it might give those directions at the hearing of the claim. It might mean that one party might be served in the first instance, upon the chance of his coming and giving the relief required. For example, in the simple case of a claim for a legacy against one out of several executors, or against a surviving executor, the executor, on being served, might say, "I admit assets," and in that case a decree might at once be made. If, however, he said, "I do not admit assets for payment of the legacy," the court might, at the hearing, require the presence of the other executors, or of the representatives of the deceased executor. That he took to be the meaning of the words "*in the first instance*," occurring in the 8th order. Upon the question of costs he had felt some doubt. It appeared, however, that the parties had been put to considerable difficulty and doubt by the terms in which those orders of April, 1850, had been framed, as to the cases which fell within them. The orders appeared, in some degree, to have misled parties into the belief that cases might be brought within them to which it was never

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intended that they should apply. He thought, therefore, that justice would be better done by dismissing the claim, without costs, than by directing them to be paid by the plaintiffs.

Claim dismissed, without costs, and without prejudice to a bill being filed.

TANNER v. STRUTTON.¹

April 24, 1851.

Practice — Exceptions.

The notice of setting down exceptions to a further answer must state the exceptions to which the plaintiff requires a third answer.

In this case the plaintiff had taken a great number of exceptions to the defendant's answer. The defendant put in a further answer to some of the exceptions, and the plaintiff then served the defendant with notice "that the exceptions had been again set down for hearing."

Martindale, for the plaintiff.

Terrell, for the defendant, objected, that the particular exception or exceptions to which the plaintiff required a further answer were not stated in the notice of setting down such exceptions, as required by the 19th order of November, 1850.

Martindale. We have set down the whole, and, so far as the answer turns out to be sufficient, we shall have to pay the costs of the exceptions as to which the answer is sufficient. The defendant knows what exceptions were allowed, to which he has put in a further answer; and to that answer we object for insufficiency. Why should we be required to inform him of what he must know? That cannot be the meaning of the order.

LORD CRANWORTH, V. C. It is clear, that what you are to set down is those allowed exceptions. You are not to take out certain portions upon the second insufficient answer coming in; but, in order to prevent unnecessary costs, you are, at the time of setting down, to state as to which of them you require a further answer.

Objection allowed.

¹ 15 Jur. 457.

Homer v. Gould.

HOMER v. GOULD.¹

April 29, 1851.

Will — Life Interest.

A testator gave shares of the annual produce of his residue to each of his three children, and directed, that, after the decease of any one or two of them, such of the shares as belonged to the parent should go to the children of the parent; and after the decease of the survivor of his children, he gave the residue to his grandchildren. One of the children died, leaving issue, who died in the lifetime of one of the other children:—

Held, that the representatives of the issue were entitled to the share of the annual produce which belonged to the parent.

THE will of John Habbin, yeoman, dated the 3d of April, 1790, contained the following words: "And I do by this my will order and direct, that the interest, dividends, and annual proceeds of all the residue of my said estate shall, from the time of my decease, be divided in eleven equal parts or shares, and that my said trustees shall pay and divide the same yearly unto and amongst my children John Habbin, Sarah, the wife of William Greenfield, and Mary, the wife of John Randall, during their respective lives, in the following portions: namely, unto my son, the said John Habbin, four shares; unto my daughter, the said Sarah Greenfield, four shares; and unto my daughter Mary Randall three shares, of the said interest, dividends, and annual proceeds; and from and after the decease of any one or two of my said children until the decease of the survivor of them, I direct that such of the said shares as belong to the parents respectively, in their lifetime, to go unto and be equally divided amongst all the children, except the said John Habbin, my grandson, of such one or two of my said children so dying; and from and immediately after the decease of the survivor of my said children, I order and direct that my said trustees shall pay and divide all the residue of my estate, so vested in them in trust as aforesaid, unto and amongst all my grandchildren, being the children of my said son and daughters, who shall be then living, except the said John Habbin, my grandson, equally to be divided amongst them, *per capita*, and not *per stirpes*, share and share alike; and if any of my said grandchildren shall be then dead, leaving lawful issue of their bodies, my will is, that such issue shall stand in the place of such deceased parents respectively, and receive the same proportion of my estate which such parent would have been entitled to if living." John Habbin died in 1790, Mrs. Randall died in 1813, and Sarah Greenfield, who was the survivor of her brother and sister, lived till 1842. Mrs. Randall left no children, but had three, all of whom died in her lifetime, and were represented in the suit by the defendant John Ragless. After Mrs. Randall's death, the trustees from time to time, up to the death of Sarah Greenfield, invested and accumulated her three-eleventh shares of the dividends of the residuary estate; and the only point in the

¹ 15 Jur. 457.

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cause was, to whom these accumulations were to go. The suit was instituted for the administration of the estate of John Habbin; and at the hearing, on the 30th of April, 1847, the vice chancellor of England expressed his opinion that the children of Mary Randall did not take vested interests, and were not necessary parties. The cause now came on upon further directions, the representative of the children having been brought before the court.

Stuart and Murray, for the plaintiffs, contended that the accumulations fell into the capital of the residue, and were to be distributed accordingly among the grandchildren and great-grandchildren who were living at the death of Sarah Greenfield, and that the whole will clearly showed an intention that the three elevenths of the interest was only to go to the children by way of substitution for their parent, in case of their surviving such parent.

Fleming, for parties in the same interest.

K. Parker, for the trustees.

Malins and W. W. Mackeson, for Ragless. If money is given to A for life, and after his death to his children, those children take vested transmissible interests at the death of the testator, whether they survive A or no. This principle is equally applicable to dividends or interests *pur autre vie*, which this is an instance of, and the representative of the three children of Mary Randall is therefore entitled.

LORD CRANWORTH, V. C. I come to the conclusion to which I have come with some reluctance, as I shall differ from the decision of one of my predecessors; but I have come to this conclusion with less reluctance, because he had not the party before him. I do not go along with the argument that we must construe this as if the question had been put to the testator. Suppose a child dies in such a time, what do you mean to be done with the dividends? He would, no doubt, have said he did not mean them to go to the executors. But the facts are complicated, and we cannot speculate upon what he meant to do otherwise than by seeing what he has said. It is clear, that if I direct the interest of a particular sum to be given to A B, and to trustees after his death, A B takes it during his life, and when he dies his executors; so if it is given to A B for life, and afterwards to C D during the life of J S, when A B dies, C D's executors take it. Suppose there had been no mention about children and survivor; suppose he had mentioned them by name; suppose he had known which would die first. He says, "From and after the decease of my daughter Sarah to the decease of my daughter Mary I direct that the interest of 4000*l.* shall be equally divided among A, B, and C." Then he dies; A, B, and C die, and then the daughter Sarah; can any one doubt that the representatives of the children would take? And this is only complicated, because there is a large family; but put names where the testator has said "children," and there will be no doubt. Declare that the accumulations belong to the personal representative of the three children.

Kemp v. Sober.

KEMP v. SOBER.¹

May 13, 1851.

School — Injunction.

A covenant not to carry on any calling in a house, or to suffer the same to be used to the annoyance of other houses, extends to keeping a girls' school.

The covenantee had allowed schools to be kept in other houses in the same neighborhood, and held under the same covenant:—

Held, nevertheless, that the court would interfere by injunction.

THE bill in this case was filed by Frances Margaretta Kemp, against Ann Sober, Mary Wilmshurst, and Sarah Wilmshurst. It stated, that in the year 1847, the plaintiff, Mrs. Kemp, was seized in fee of two houses, Nos. 22 and 23 Sussex Square, Kemp town, Brighton, and by an indenture, dated the 28th of December, 1847, the plaintiff granted and conveyed No. 23 to the defendant Mrs. Sober and her heirs, subject to the following covenant, among others, that she, the said Ann Sober, her heirs and assigns, would not at any time thereafter alter, or suffer to be altered, the then present elevation of the messuage No. 23, or put, or suffer to be put, any shop window in any part of the said messuage, or carry on any trade, business, or calling whatsoever in or upon any part of the hereditaments therein described, or otherwise use, or suffer the same to be used, to the annoyance, nuisance, or injury of any of the houses at Kemp town: that the said several covenants should run with the land since laid out, and called Kemp town aforesaid, and should pass therewith, and that the plaintiff, her heirs and assigns, should forever have the benefit thereof. That in the month of January last, the defendant Mrs. Sober agreed to grant a lease of No. 23 to the defendants Mrs. and Miss Wilmshurst, for the purpose of a school for ladies being opened and carried on therein. That the plaintiff was still the owner of, and resided in, the house No. 22, and that the carrying on of a school in No. 23 would be a great annoyance to the plaintiff, and a serious injury to No. 22. And the bill prayed that the defendants might be restrained from carrying on a school in the said house, and that Mrs. Sober might be restrained from granting a lease for that purpose to Mrs. and Miss Wilmshurst. The plaintiff now moved for an injunction accordingly, and filed affidavits verifying the statements in the bill. Mrs. Sober filed affidavits in opposition, to the effect that in Kemp town and in Sussex Square were many schools; that Mr. Kemp, the husband of the plaintiff, occupied No. 23 for many years, and had let Nos. 21 and 22 for schools; that in 1828, Mr. Kemp had contracted to sell the house No. 23 to Mrs. Sober, and that the indenture of 1847 was executed by Mrs. Kemp, as his residuary devisee; that most of the owners of houses in Kemp town had entered into similar restrictive covenants with Mr. Kemp, and that Mr. Kemp had allowed schools in such houses; that no complaints

¹ 15 Jur. 458.

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had been made of any annoyance from the school; that the number of pupils was small; and that Miss Wilmshurst had offered to make any arrangements to prevent any disturbance to Mrs. Kemp.

Temple and *J. H. Tayler*, in support of the motion, cited *Doe d. Bish v. Keeling*, 1 Mau. & S. 95.

Malins and *Piggott*, for Mrs. Sober. The houses in Kemp town are held under Mr. Kemp's assigns on the same terms as this house is held, and Mr. Kemp allowed schools to be kept in those houses, and actually let Nos. 21 and 22 for schools, and he has thereby waived the covenant, *The Duke of Bedford v. The British Museum*, 2 My. & K. 552, or shown his interpretation of it to be that it did not prevent a school from being kept. *Elmhirst v. Spencer*, 2 Mac. & Gor. 45. There is no suggestion that any actual annoyance has been felt, and we show that the school is small, and is only a ladies' school, which is quite different from a boys' school, as in *Doe d. Bish v. Keeling*, 1 Mau. & S. 95. This court will not interfere unless there has been actual injury. *The Attorney General v. The Manchester and Leeds Railway Company*, 1 Railw. Cas. 457.

Willcock, for Miss Wilmshurst, on the same side.

LORD CRANWORTH, V. C. My doubt is, whether keeping a school is within the covenant. The question is, whether you are guilty of a breach of the covenant simply by keeping a school.

Temple, in reply. The covenant is, that you shall not keep a shop or carry on a calling, or do any thing that may prove an annoyance. Suppose the word "school" had actually been used, it would not then have been necessary to show any actual annoyance. The object of these covenants was to keep these houses private houses, and there has been no waiver of the covenant.

LORD CRANWORTH, V. C., here stated that his only doubt was as to the covenant running with the land, and suggested that Miss Wilmshurst ought not to be interfered with till the expiration of her year of tenancy; which not being objected to by the plaintiff, his lordship said: I am prepared to state, that, in my opinion, this is clearly a case in which the court should interfere, as there has been a clear breach of the covenant. I think it is clear that the words mean something else besides what is stated. The covenant is, not to put any shop window in any part of the said messuage, or carry on any trade, business, or calling whatsoever in or upon any part thereof, or otherwise use, or suffer the same to be used, to the annoyance, nuisance, or injury of any of the houses at Kemp town. I should have had little doubt that carrying on a school is carrying on a calling; and there is the decision of the Court of Queen's Bench, in *Doe d. Bish v. Keeling*, 1 Mau. & S. 95, that it is a calling in violation of the covenant. There the school was a boys' school, and Lord Ellenborough points

Kemp v. Sober.

out the way in which such an occupation would come within the meaning of that covenant; and I cannot fix any rule that carrying on a boys' school is a calling, and carrying on a girls' school is not; and though Lord Ellenborough points out the annoyances of having a boys' school, yet that is not the only annoyance, for if they mean to have twenty young ladies, independently of any noise of practising music, there will be the perpetual coming and departure of persons to see them, all which might be considered by the neighbors as an annoyance. The court cannot speculate how much annoyance it is, if the parties have stipulated on the subject. Then it is said that this case comes within the principle on which the court has refused to interfere until there has been real damage within the terms of the covenant. But the covenant is, not to keep a school; the lady says she will prevent annoyance, and that may mitigate it; but when I stipulate that there shall not be a school, and that I shall be relieved from all anxiety about it, the keeping a school is damage, and more or less is a matter which the court is incapable of going into. Then this case was likened to the case of *The Duke of Bedford v. The British Museum*, 2 My. & K. 552, because it was said that the covenant has been violated in these houses of Kemp town, and amongst others by Kemp himself. But it seems to me that there is a great distinction in the case of *The British Museum*. A century ago the Duke of Bedford sold the land on which the British Museum now stands, for building Montague House, he having his own house, Southampton House, near. He conveyed it upon trust that there should be no buildings to be an annoyance to Southampton House, and so that there should be another great house near his own. In that time there were none but great houses of the nobility in that part of the town; and the Duke of Bedford stipulated that there should be no buildings, for the purpose of keeping the ground open and in fields. A hundred years rolled on, and in the mean time the Duke of Bedford had given up Southampton House, and had covered all the district with buildings. The British Museum having proceeded to build, he, either of his own authority, or at the instance of the tenants of his estate, filed a bill to restrain the building of that which was, in terms, a violation of the covenant. It came on before Sir John Leach, who directed a case to law. A motion was made, by way of appeal, before Lord Eldon, who was of opinion that Sir John Leach took an erroneous view, because no judge should direct a case unless he is satisfied of the propriety of the court interfering. Then he said, What is this court to do if it is satisfied that the covenant is valid? There will then be no case for the interference of this court, because the covenant was for the purpose of keeping all this open, and the Duke of Bedford had rendered that impossible by building on his own land; and it was absurd to speak of determining, when nine hundred and ninety-nine buildings had been built, whether the one thousandth should be. If you have a right at law, exercise it; but this court will not interfere. This case was likened to that, for it seems that there are many schools on the Kemp property; but if every house had been used as a school, the moment they ceased to

In re Watts, &c., ex parte Watts.

be so used, the property remains the same as before; but it is impossible that the property in Bedford Square should ever become pleasant fields again. The plaintiff is entitled to the relief she asks for, but I do not think she will be entitled to relief during the year. I need not, however, go into that question, because the injunction must be qualified not to interfere with the occupation of Miss Wilmshurst during the present year.

*In re WATTS'S SETTLEMENT, in re THE ACT 1 WILL. 4, c. 63, and in re THE TRUSTEE ACT, 1850, Ex parte WATTS.*¹

May 2, 1851.

Power to appoint new Trustee in Place of one incapable to act — Construction of Word "incapable" — Vesting Order, under the Trustee Act, 1850, inapplicable when one only of several Trustees is out of the Jurisdiction.

By the terms of a settlement, power was given to appoint a new trustee in the place of any trustee who should become incapable to act:—

Held, that the word "incapable" had reference to personal incapacity, and that the power could not be exercised where a trustee, having become bankrupt, had been indicted for not surrendering, and had gone abroad.

Seemle, that a vesting order, under sect. 10 of the Trustee Act, 1850, is inapplicable where one only of several trustees is out of the jurisdiction, and a new trustee is appointed in his place, the other trustees remaining.

In June, 1848, an order was made upon petition, presented under the act 11 Will. 4, c. 60, whereby it was referred to the master to inquire whether Thornton Bentall, therein mentioned, was a trustee of the estates comprised in certain indentures of settlement mentioned in the petition, and in which Bentall and two others were named as trustees; and if the master should find that the said Thornton Bentall was a trustee of the said premises, then he was to inquire and certify whether Bentall was out of the jurisdiction; and if he should find in the affirmative, then to inquire and certify whether there was any power in the indentures of settlement to appoint a trustee in his place; if there should be no such power in the settlement, then the master was to approve of some proper person to be a trustee in the place or stead of Bentall, and also to approve of a proper person to convey and assign, and join in conveying and assigning, the trust estate vested in Bentall under the indentures of settlement, to the continuing and new trustee of the said indentures. It appeared, that, by the indentures of settlement, a power was given to certain parties beneficially interested in the trusts of the settlement, and after their deaths to the trustees of the indentures for the time being, to appoint one or more trustee or trustees in the place or

¹ 15 Jur. 459.

In re Watts, &c., ex parte Watts.

stead of any trustee or trustees who should die, or be desirous of being discharged of and from, or refuse, or decline, or *become incapable* to act in, the trusts of the indentures of settlement. The master, by his report, dated in February, 1851, certified that Bentall was a trustee within the meaning of the indentures of settlement; that he had become bankrupt, had never surrendered under the fiat, had been outlawed and indicted for not surrendering, and had absconded, and was then living abroad. The master certified, that, under these circumstances, there was no power to appoint a trustee in his place given by the indentures of settlement, and that he had, therefore, approved of a proper person to be a trustee in his place, and of a proper person to convey the trust estate vested in Bentall to the continuing trustees and the new trustee. The present petition was then filed, praying that the master's report might be confirmed; that the person approved of by the master might be appointed a trustee of the trust premises in the place of Bentall; that the person approved of by the master might be directed to convey the estate vested in Bentall to the continuing trustees and the new trustee; and that the court would make an order, under the Trustee Act, 1850, vesting the trust estates in such continuing trustees and new trustee.

Shapter, in support of the petition, contended that the facts certified by the report with reference to Bentall were not tantamount to incapacity within the meaning of the settlement. Bentall might still act, by giving a power of attorney from time to time; or he might interpose within the jurisdiction. *Wilhington v. Wilhington*, 16 Sim. 104.

Rolt and Thring, contra, contended that absconding, bankruptcy, &c., was an incapacity within the meaning of the settlement. *Wilson v. Wilson*, 6 Scott, 540. *In re Roche*, 2 Dru. & W. 287.

SIR GEORGE TURNER, V. C., said he thought the term "incapable," used in the settlement, had reference to personal incapacity, and that the absence of Bentall, and his situation with regard to the bankruptcy, did not constitute personal incapacity. In *Wilson v. Wilson* the question was as to capacity as a committee-man. In *re Roche* the question was as to fitness. Seeing, therefore, that the other trustees could not appoint a trustee in lieu of Bentall, the master's report would be confirmed. With regard to the order to be made, the better course would be, not to make a vesting order, but an order that the party appointed to convey for Bentall should join with the two continuing trustees in conveying the trust premises to the three, viz., the two continuing trustees and the new trustee approved of by the master. He felt great difficulty in applying the provisions of the act, as to a vesting order to this case. It was enacted by sects. 10 and 34 of the recent act, 13 & 14 Vict. c. 60, that a vesting order thereunder should have the same effect as if the former trustee had duly executed a conveyance or assignment of the lands. Where, as in the case before him, there were several trustees, one of

Richardson v. Ward.

whom was out of the jurisdiction, such a conveyance by the absent trustee would operate as a severance of the joint tenancy.

Rolt said that such a construction of the act would have the effect of preventing its operation in all cases where there was a plurality of trustees.

SIR GEORGE TURNER, V. C., said he did not see why it would not. There would be no difficulty in the case of a sole trustee.

An order was taken in the form suggested.

RICHARDSON v. WARD.¹

December 20, 1850.

Records — Clerical Error — Rectifying Proceedings.

The court, upon being satisfied that a clerical error had arisen in the master's report, sanctioned an alteration which had been made, and allowed the subsequent proceedings to be rectified in conformity.

On the 4th of May, 1850, a reference was made, upon the petition of Norman Macleod and George Henry Stephenson, the surviving executors of the will of Thomas Ward, deceased, directing the master to inquire whether it would be for the benefit of the infant defendant, Ellen Middleton Ward, that certain leasehold premises should be assigned by the petitioners to the British Gas-light Company, upon the terms of an agreement which had been entered into between them, or upon any other terms.

On the 1st of July, 1850, the master, by his report, stated that the premises had been several times put up to auction, but had not been sold; that they were let at 105*l.* a year, and were subject to a sum of 7*l.* 17*s.* 6*d.* a year for land tax; that the premises had been taken at a high rent, as an increased accommodation for the business of a ship owner, carried on by the testator; and that, as they were then let, there would be an annual deficiency of 42*l.* 17*s.* 6*d.*, to be made good by the testator's estate, which, without calculating interest, would, at the end of the term of sixty-one years, amount to 1000*l.*; that on the 15th of April, 1850, a provisional agreement had been entered into, by which, if approved of by this court, Norman Macleod and G. H. Stephenson had agreed to pay 150*l.* to the British Gas-light Company, in consideration of their taking an assignment of the premises for the residue of the term, and indemnifying them against the rent and covenants in the lease, and the master certified that it would be for the benefit of the infant defendant, E. M. Ward, that

¹ 20 Law J. Rep. (N. S.) Chanc. 227.

Preston v. Collett.

the leasehold premises should be assigned to the British Gas-light Company upon the terms mentioned in the agreement.

An order was afterwards made, upon the petition of N. Macleod and G. H. Stephenson, confirming the master's report, and authorizing them to assign the leasehold premises to the British Gas-light Company for the residue of the term of sixty-one years, and to pay out of the assets of their testator the sum of 150*l.* to the British Gas-light Company, upon their executing a duplicate of the assignment.

Upon inspecting the report, the British Gas-light Company ascertained that the agreement had been erroneously stated, and that the sum of 150*l.* mentioned in the master's report, and in the subsequent petition and order, had been inserted by mistake for 350*l.*, and they required it to be altered. Upon its being brought to the attention of the master, he sent for the report and wrote on the margin, "The sum of 150*l.* is a clerical error; it ought to have been 350*l.*, and I have altered it accordingly."

On the 18th of December, it was asked that the correction made by the master might be confirmed, that the petition might be amended, and that the order made upon it might be made to conform to the petition.

THE MASTER OF THE ROLLS directed the master's report to be produced, and if it should be found necessary, he gave the petitioners leave to make an affidavit, stating how the mistake arose.

Mr. Bevir now renewed the application.

THE MASTER OF THE ROLLS. The proper course would have been to apply to the master of the rolls for leave to rectify the error, and then, upon the note of the registrar, the record and writ clerk would have given out the report to be corrected by the master, after which it should have been confirmed by the court before any subsequent step was taken. The master's report, as it now stands, appears to be as it was originally intended: you may, therefore, amend the petition, and after that, the order made upon it may be amended.

PRESTON v. COLLETT.¹

January 25, 1851.

Practice — Motion to dismiss — At what Period it may be made.

The answer became sufficient on the 2d of August, and the four weeks allowed from that time to amend the bill, extra the vacation, expired on the 18th of November. The defendant served notice of motion to dismiss at half past seven o'clock on the evening of the 18th of November: —

¹ 20 Law J. Rep. (N. S.) Chanc. 228.

Preston v. Collett.

Held, that the four weeks did not expire till twelve o'clock at night, and consequently that the notice of motion was given before the plaintiff was in default. Motion dismissed with costs.

THIS was a motion, on behalf of the defendant, to dismiss the bill for want of prosecution. The bill was filed on the 27th of June, 1849. The answer was filed on the 21st of June, 1850, and no exceptions having been filed, it became sufficient on the 2d of August following, being six weeks afterwards. On the 18th of November, that being the day on which the four weeks terminated after the answer became sufficient, the defendant served notice of motion to dismiss for want of prosecution. The notice was served at half past seven o'clock at night.

Mr. Bethell and *Mr. Toller* appeared in support of the motion.

Mr. Roll and *Mr. Tripp*, contra, urged that the defendant had served the notice of motion before he was entitled to do so under the orders of May, 1845. The answer was filed on the 21st of June. By the 31st order of 1845, it would have been sufficient if no exceptions had been filed within six weeks. None were filed, consequently the answer was sufficient on the 2d of August, 1850. By the 33d clause of the 16th order, the plaintiff was allowed four weeks after the last answer should be deemed sufficient to obtain an order to amend. By the 11th order, it was provided that the times of vacation should not be reckoned in computing the time for obtaining orders for leave to amend bills. The long vacation, commencing on the 10th of August and ending on the 28th of October, left the plaintiff for amending seven days in August, three in October, and eighteen in November, consequently notice to dismiss could not be given till the 19th of November. In this case, it appeared that the notice to dismiss had been given at half past seven o'clock on the evening of the 18th. By the 118th order, the defendant was not to be at liberty to move to dismiss for want of prosecution until after the expiration of the time within which the plaintiff might obtain an order to amend his bill. This order would equally apply to the notice of motion; and, consequently, the defendant had come to the court a day before his time, as the 18th of November could not be considered to have expired until twelve o'clock at night.

Mr. Bethell, in reply, contended that the four weeks within which the plaintiff was at liberty to amend expired at the time the office closed on the 18th of November. After that period he could not have obtained an order for leave to amend, and the defendant was, therefore, quite right in serving notice of motion to dismiss any time on the evening of the 18th.

LORD CRANWORTH, V. C. My opinion is, that this motion may be decided on very short grounds. I think, according to the 118th order, it is contrary to the rules of the court. The words of that order are, "A defendant is not to be at liberty to move to dismiss a bill for

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want of prosecution until after the expiration of the time within which a plaintiff may obtain an order to amend such bill." Ord. Can. 332; 14 Law J. Rep. (N. S.) Chanc. 296. Now, this plaintiff was in such a situation that he was entitled to file and might have filed replication up to twelve o'clock at night on the 18th of November. It is very improbable that he should have applied after eight o'clock at night, but the line must be drawn somewhere, and it is clear that the precise time at which the day ends is twelve o'clock. This notice to dismiss was given by the defendant in the evening of the 18th, at half past seven; and, consequently, it was given before the plaintiff was in default. The motion must, therefore, be refused, with costs.

In re THE NORTHERN COAL MINING COMPANY; ex parte BAGGE.¹

January 27 and 28, and February 8, 1851.

Company — Winding-up Acts, 1848 and 1849 — Directors — Purchase of Shares — Contributory.

B, an original promoter of a company, executed the deed of partnership for 100 shares; he subsequently obtained other shares, making in all 1000 shares. The provisions of the deed of partnership were not duly observed by the directors. B paid three calls, and received the only dividend ever made while he continued a shareholder; upon a fourth call, B, without reference to the forms of the deed respecting sales of shares, gave up 260 shares to the directors, which they agreed to purchase for the company, in consideration of a sum of money, and the amount of the fourth call. B afterwards sold the rest of his shares, and ceased to be a partner. The company was carried on for eight years after the sale of the 260 shares to the company, but it subsequently fell into difficulties, and in winding up the affairs of the company, under the 11 & 12 Vict. c. 45, and the 12 & 13 Vict. c. 108, it was desired to place B upon the list of contributories in respect of the 260 shares, on the ground that the transaction with the directors was not valid:—

Held, that the company, after having dealt with a shareholder, could not treat the transaction as void for a want of form, though not immaterial, which their own irregularities had rendered it impossible to observe; and the motion that the master might review his decision was refused, with costs to be paid out of the estate.

THIS was a motion that the order of the master striking off the name of William Bagge from the list of contributories of the Northern Coal Mining Company, with costs, might be discharged, and that his name might be restored to the list in respect of 260 shares held by him in the company, or that it might be referred back to the master to review his decision.

The deed, forming the company, was dated the 1st of June, 1838, and was of two parts, comprising parties named in two schedules, the first being the parties forming the company, and the second the subscribers, and they mutually covenanted the one with the other and others for the formation of the company, which was to subsist for forty years from the date of the deed. The 5th section declared that the property of the company should be deemed personal estate. The

¹ 20 Law J. Rep. (N. S.) Chanc. 229.

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6th section declared that the proprietors should not have any interest in any real or personal property purchased by the directors out of the funds of the company, or bound by any contract entered into on behalf of the company, but that they should only be entitled each to a personal claim on the directors in respect of the shares to which they might respectively be entitled. The 9th section provided, that the name, place of residence of every present and future proprietor, and the number of shares belonging to him or her, and the proper number of each share, should be entered in a book which the directors of the company should cause to be kept for that purpose, to be called "The Share Register Book." Sect. 12 provided that the directors, when required so to do, should cause to be delivered to every present and future proprietor a certificate, signed by three of the directors, stating the number of shares held by such proprietor in the capital of the company, and the specific number of every share. The 13th section provided, that upon every transfer of shares the certificate or certificates held by the former proprietor of such shares should be cancelled, and a certificate should be given (upon request to the person into whose name such shares should be transferred) of the number of shares so transferred to him or her, and if any of the shares included in the certificate so to be cancelled should be retained by the old proprietor, a new certificate in respect thereof should, upon request, be given to him or her. The 22d section provided, that parties becoming entitled to shares by devolution or by operation of law, should make out their title before the secretary before selling any share in the copartnership. The 23d section provided, that when once the directors should accept the executors, or administrators, or legatees of a deceased proprietor, or the husband of a female proprietor, or so accept any proposed purchaser as the proprietor of any shares proposed to be sold, the same should be forthwith transferred to them respectively in such manner and form as should be prescribed by the directors for the time being, and every transfer was to be executed by the person taking it taking upon himself the liabilities to which the former proprietor was subject in respect of such shares.

The 25th section provided that in every case, in which notice should be given or left proposing the substitution of any other person as a proprietor in the place or stead of the then present proprietor, or of a deceased bankrupt, insolvent, or lunatic proprietor, the directors of the company or some two of them should, at or before the expiration of fourteen days from the time such notice should be so given or left, signify in writing whether they were willing to accept the person proposed as a proprietor, and in case they should decline so to do, then, and in every such case, the directors should, with and out of the capital or joint stock of the copartnership, and for its benefit, purchase the shares to be mentioned in every such notice at such price per share as should be equal to the aggregate average of the prices mentioned in the ten transfers of shares actually sold and registered in the transfer register book of the said copartnership next immediately preceding the purchase. The 26th section declared that whenever any shares in the said copartnership should be vested in any new

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proprietor, and such new proprietor should have qualified himself to hold the same by executing these presents, or such other deeds or deed as aforesaid, or when any shares in the said copartnership should be vested in the company, where the company should become the purchasers thereof, then, but not before, all future liabilities on the part of the previous proprietor of such shares should cease, and he was to be exonerated from all claims in respect of the same shares, and from all future observance of the provisions of the deed of settlement. By the 29th section, the directors had power to make calls, and by the 30th section they were empowered to sue for the calls, or to declare the shares forfeited. There were also many other provisions applying to the directors, and for the management of the company, but difficulties arose, and the 5 & 6 Vict. c. 21, and the 7 & 8 Vict. c. 31, were obtained for the purpose of managing the company, and for raising further capital.

Mr. Turner and *Mr. Daniel*, in support of the motion. The question is, whether the directors could purchase from *Mr. Bagge* shares held by him in the company, of which he was not the complete owner, and in respect of which he was never registered. It has been held, that a shareholder did not determine his liabilities if he sold his shares to the company in a way not authorized by the deed of settlement. *Ex parte Morgan*, 1 Hall & Twells, 320; s. c. 1 M. & G. 225; 1 De Gex & Sm. 750; 18 Law J. Rep. (N. S.) Chanc. 265. *Ex parte White*, 3 De Gex & Sm. 157; s. c. 19 Law J. Rep. (N. S.) Chanc. 497. *Ex parte Stanhope*, 19 Law J. Rep. (N. S.) Chanc. 389. The right to sue *Mr. Bagge* arose by his having paid calls. The 5 & 6 Vict. c. 21, did not say that those not memorialized were not liable *inter se*; the memorial of having ceased to be a shareholder could not determine any existing liability, and the question is whether *Mr. Bagge* ever ceased to be a proprietor of the shares, and it certainly seems that he never did.

Mr. Roundell Palmer and *Mr. Kennion*, contra. The scrip certificates were issued in 1837, and there was no other document of title until 1842, when a share register list was made; but a holder of shares was not bound to go on with the undertaking, if the share list was not filled up. Unless, therefore, he had concurred in the company's going on with a knowledge of a partial subscription of the share list, he was not bound. As to the shares sold, he was in the situation of never having been a proprietor. But, assuming that he was a shareholder in respect of the 260 shares, the 22d, 23d, and 25th sections of the deed empowered the directors to purchase them and relieve the holder from all further liability. *Taylor v. Hughes*, 2 Jones & Lat. 24. *Ex parte White*. And though all the formalities required by the deed have not been complied with, that is immaterial, considering the state of the company and the manner in which its books were kept, more especially as the general powers vested in the directors a discretion for the management of the company. The memorial of *Mr. Bagge* having ceased to be a proprietor, was, by the

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5 & 6 Vict. c. 21, sects. 22, 24, 27, conclusive against every body that Mr. Bagge had ceased to be a partner in the concern; and, assuming that any irregularity had taken place, the directors and the company had acquiesced, and had waived. *Walford v. Adie*, 5 Hare, 112. *Crellin v. Brook*, 14 Mee. & W. 11; s. c. 14 Law J. Rep. (n. s.) Exch. 375. If the transaction had been impeached sooner, Mr. Bagge could not have been a loser. The shares when sold were at a premium, and the company went on for eight years afterwards, and its present failure was owing to extravagance and negligence. It would, however, be impossible for companies to carry on their business if their transactions were to be impeached after any length of time. *Geddes v. Wallace*, 2 Bligh, 270. *Const v. Harris*, Turn. & Russ. 496. *Taylor v. Hughes*. *Walford v. Adie*. *Burnes v. Pennell*, 2 House of Lords Cases, 522, 497. Each shareholder must be considered as having had notice of the purchase, and they should have impeached the transaction long since. *Ex parte Beresford*, 2 Hall & Twells, 388; s. c. 2 M. & G. 197; 3 De Gex & Sm. 175; 19 Law J. Rep. (n. s.) Chanc. 332. *Ex parte Cockburn*, 15 Jur. 28, 1 Eng. Rep. 139.

Mr. Turner, in reply. Mr. Bagge executed the deed for a portion of his shares, he also paid the calls made upon him in respect of all the shares, and received the dividend made upon them; he must, therefore, be considered a partner in the concern, and interested in the capital to the extent of the whole of such shares. Under these circumstances, the proviso for entering the name on the register could not alter the covenant previously entered into by Mr. Bagge with the company; and the purchaser of scrip certificates from a shareholder could not, after the formation of the company, in the absence of any special contract, be compelled to take the corresponding shares from his vendor, or to indemnify him from subsequent calls. *Jackson v. Cocker*, 4 Beav. 59; s. c. 10 Law J. Rep. (n. s.) Chanc. 236. *Blundell v. Winsor*, 8 Sim. 601; s. c. 6 Law J. Rep. (n. s.) Chanc. 364. *Harrison v. Heathorn*, 6 Man. & G. 81; s. c. 12 Law J. Rep. (n. s.) C. P. 282. A resolution that the shares in a company should be transferable does not make it a bubble company. When Mr. Bagge signed the deed, there was no suggestion that it was done with a limited responsibility; and if more shares were issued than the deed was signed for, the party to whom they were delivered became, by sect. 12, a shareholder. Mr. Bagge's name appeared in the rough-book of the company. The transactions with Mr. Bagge were not communicated to the shareholders. If they had been warranted by the deed, the parties might be considered as having acquiesced; but that was not so, if they were not warranted by the deed.

February 8. The MASTER OF THE ROLLS. This is a motion made by the official manager of the Northern Coal Mining Company to discharge an order made by the master, who held that William Bagge was discharged from liability in respect of 260 shares purchased by the company from Mr. Bagge. The case is brought before me in such a manner, and with such evidence, that, I confess, I now

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doubt, as I did at the hearing of the motion, whether I have understood as correctly as I ought the facts of the case, and I desire that the statement may be considered as open to the observation and correction of the parties. Mr. Bagge was one of the original promoters of the company, and he executed the deed as stated for 100 shares; he thereby became a partner, and as such became entitled to, and interested in, the capital or joint-stock property and effects of the copartnership in proportion to the number of his shares. The shares were to be paid as called for by the directors under the provisions of the deed, and the number of shares belonging to any proprietor was to be entered in a book, which the directors were to cause to be kept for that purpose, to be called "The Share Register Book," and the directors when required so to do were to cause to be delivered to every proprietor a certificate, stating the number of shares held by such proprietor in the capital of the company, and the specific number of every such share. Any proprietor before selling any share held by him was to give notice of his intention to sell, and if the directors accepted the proposed purchaser, the shares sold were to be transferred to him in a form to be prescribed, and no person was to be admitted a proprietor unless approved by a board of directors; and if the directors declined to accept the person proposed as a proprietor, they were empowered out of the capital of the company, and on behalf of the company, to purchase the shares mentioned in the notice, at such price per share as should be equal to the aggregate average of the prices mentioned in the ten transfers of shares actually sold and registered in the transfer register book of the copartnership next immediately preceding such purchase, and then all future liability of the previous proprietor was to cease. The deed contained a subsequent clause, whereby the directors were required to act in strict conformity with the rules thereby established in all cases thereby provided for; and in all cases for the time being not provided for, the directors were empowered to act in such manner as should appear to them best calculated to promote and increase the business and welfare of the company.

The business of the company was commenced and carried on, but the provision in the deed that a share register book should be kept was wholly neglected for three years, and, consequently, no transfer of shares was or could be made in the formal and careful manner directed by the deed. Some books, indeed, the nature and effect of which have been very imperfectly explained, were kept, and these contained some entries showing who were or might be entitled to shares at the time when the entries were made, and shareholders, or persons who were entitled to be shareholders, instead of receiving certificates, stating the number of shares held by them, and the specific number of every such share, received what were called scrip certificates, purporting that the holder thereof (no name being mentioned) was entitled to so many shares in the company, subject to the conditions indorsed thereon, and stating in the indorsement that the affairs of the company were to be under the control of the directors, subject to the conditions of the deed of settlement.

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Various calls were made upon persons holding scrip certificates, claiming to be or to become proprietors, and two dividends were paid. Mr. Morgan, who was the first secretary of the company, states that the scrip was required to be produced at the time of the payment of the dividend, and on the production of it, and payment of the dividend, the stamp was affixed. He says further, when a person produced scrip for payment, he, the secretary, looked into the books he had, to see whether the person applying for payment was a proprietor, and on payment of the calls he also referred to the book, to see whether the parties paying them were proprietors of the number of shares upon which the calls were paid. Mr. Harrod, who became secretary about July, 1841, says that the books had not previously been kept regularly; that they did show the quantity of scrip, but not the number thereof, so that it does not appear how Mr. Morgan was able to ascertain from the books whether the holders of scrip, who were not named in the certificates, were or were not proprietors. But Mr. Harrod says, that after he became secretary, and with a view to ascertain who were the shareholders, the books and papers of the company were searched, inquiries were made in every direction, and advertisements were published calling upon the scrip-holders to bring in their scrip. The first share register book was begun to be made up about June, 1843. The evidence upon the mode in which the names were entered was, Mr. Harrod says, that the scrip was sent in by the holders or their solicitor, and whoever was the holder was registered as the proprietor, and a new certificate was then issued to the party who had brought in the scrip, and this new certificate was in the following form:—

“These are to certify that [the person named] is a proprietor of [so many] shares in the Northern Coal Mining Company, being numbered [blank] to [blank,] subject to the rules and regulations of the said company, as provided in the deed of settlement.”

Here we have, then, a certificate answering the directions contained in the clause of the deed, which directs these certificates to be given of the number of shares held by the proprietors and containing the number of each share specifically. To that form of certificate follows the date of the certificate and the signatures of the secretary and directors.

Such appearing to be the state of the case as to the registration of shares until the year 1842, the transactions of Mr. Bagge seem to have been these: In 1838 he had executed the deed of settlement for 100 shares, and was entitled to or interested in a share; that is, I suppose, an unallotted and undivided share of the capital of the company in proportion to that number of shares. At the end of a year after the date of the deed, no shares had been in any manner allotted to Mr. Bagge: his rights and liabilities rested on the covenants in the deed alone. In June and September he applied for certificates; there was at that time no share register book, no allotment of shares made to him; and there being no share register book, and no proper number attached to each share, there could be no such certificates as by the 12th clause of the deed the directors were, when required, to

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cause to be delivered to the proprietors. At that time, and for a long time afterwards, only scrip certificates were delivered, certifying that the holder [not named] was entitled to shares. Mr. Bagge received such certificates for 400 shares, on the 13th of June, and for 600 shares more on the 12th of September, 1839. Mr. Bagge, for a year or thereabouts, continued to be the holder of these certificates; and in respect of the shares comprised therein he paid a certain number of calls and received one dividend. Here, then, was a member of the company who had executed the deed, paid calls, and received a dividend, and there was no doubt of his being subject to some liability. In August, 1840, a fourth call having become payable, he wished to part with some of his shares, and through the medium of Mr. Seppings he proposed to the company or to the directors to return to them a certain amount of the shares which had been granted to him; and his proposal was complied with as to 260 shares, part of his 1000 shares. The operation was effected or intended to be effected by means of a purchase made by the company of 260 shares from Mr. Bagge, for 2860*l.*, the amount of three calls paid, and 1060*l.*, the amount of the fourth call then due, making 3920*l.* The scrip for the 260 shares was thereupon given back to the company. The transaction was entered in the journal book of the company, under the head of shares bought in the market, on the 29th of September, 1840, and in the book called the share book the 260 shares are entered as bought back by the company. These transactions relating to the 260 shares and the sale of fifty-five shares by Mr. Bagge to a Mr. Webber were previous to the formation of any share register book and to the issuing of any certificates such as those which are described in clause 12 of the deed. Mr. Bagge had scrip certificates for 685 shares remaining in his possession in 1841, when the scrip was called in for the purpose of ascertaining who were the holders, and for the purpose of forming a share register book; and in 1842 he became a duly registered holder of the 685 shares, and proper certificates were delivered to him of his being the holder of those shares. Of these 685 he afterwards disposed, and on this occasion no question is raised either as to the 685 registered shares or as to the 55 shares which were sold to Mr. Webber. In June, 1842, Mr. Bagge was memorialized as a proprietor, under the 5 & 6 Vict. c. 21, and on the 19th of January, 1843, he was memorialized as having ceased to be a proprietor, and it would, therefore, seem that all his registered shares had been disposed of before that time.

The master has held that Mr. Bagge is not subject to any liability or to be considered as a contributory in respect of the 260 shares sold back to the company in September, 1840.

In support of the motion made by the official manager to discharge the master's order, it is alleged that the sale of the 260 shares to the company was altogether void, because it was not conducted in the manner pointed out by the 25th clause of the deed of settlement, and that consequently Mr. Bagge ought now and after the lapse of ten years to be considered as the owner of the same shares.

It is true that the purchase by the company was not made according

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to the specific directions contained in the deed; neither could it have been so at that time, for at that time there was no share register book, the shares had no proper number. There had not been any certificate delivered to any proprietor stating the number of shares held by him and the specific number of every such share.

Now, I am of opinion that the scrip certificates were not the certificates meant by the 12th clause of the deed of settlement, and then the question became whether the transaction, such as it was, was not valid — whether the scripolders could not assign or alienate their scrip share by delivery of the certificates or otherwise even to the directors or to the company itself. The company, now making this claim against a person alleged to be a shareholder, ought to be able to show that their business was so conducted that individual shareholders dealing with them could act in the manner directed by the deed. Having neglected to keep a share register book, not having delivered out any certificate of the shares held by the shareholders as directed by the deed, having afterwards dealt with a holder of scrip as a shareholder for the purpose of purchasing his shares, having bought the shares mentioned or referred to in the scrip certificates, and having afterwards treated the same person as having ceased to be a proprietor, I think that they are not entitled to treat the transaction as void, merely because there had not been an observance of those forms which their own irregularity and neglect had made it impossible to observe. I am far from thinking that forms were in themselves immaterial: I presume they were meant, and they were, to some extent at least, calculated to protect the company against fraudulent and collusive purchases from shareholders. But I think that the regulations had reference to a state of things which, in consequence of the neglect of the directors, did not exist; and after the decisions which have been made on the subject of scrip shares, I cannot consider these scrip shares as inalienable even to the company itself in any ordinary mode of transfer.

I am, therefore, of opinion that the motion must be refused, with costs, which must be paid out of the estate.

Mr. Roundell Palmer. The subject of costs was before Lord Cottingham, who said, that, by an omission of the legislature, the court was so situated, that, however justice might require that costs should be paid at all events, yet the act of Parliament disabled the court from giving them, except out of the estate.

Ashton v. Langdale.

ASHTON v. LANGDALE.¹

May 2, 1851.

Statute of Mortmain, 9 Geo. 2, c. 36 — Shares in incorporated and unincorporated Companies — Railway Mortgages and Debentures — Railway Scrip — Practice — Exceptions to Report.

Shares in incorporated companies having interests in land, as canal companies, railway companies, &c., constituted by acts of Parliament, under which the shares are declared to be personal estate, are not within the Mortmain Act, 9 Geo. 2, c. 36.

Debentures given by incorporated companies having interests in land, which merely contain a personal obligation, and do not convey the undertaking, tolls, &c., to the holder, are not within the Mortmain Act.

Shares in an unincorporated banking company, which was authorized to hold lands by way of mortgage, and might have had interests in lands, and which had been constituted by deed of settlement, under which the shares were declared to be personal estate, held not to be within the Mortmain Act.

Railway scrip is not within the Mortmain Act.

Mortgages given by a railway company of the undertaking and tolls, rates, and sums arising by virtue of the act of Parliament under which it was constituted, held to be within the Mortmain Act.

Where exceptions to a master's report relate only to matters of law, and not to matters of fact, the court will not make any order on the exceptions, but express its decision by way of declaration.

It was conceded by the parties interested in opposing it, that a bequest to the commissioners for the reduction of the national debt, to be applied in reduction of the national debt, was a charitable use.

JOHN ASHTON, by his will, dated the 15th of November, 1836, after certain bequests therein contained, made the following disposition:—

"I give and bequeath all the rest, residue, and remainder of my personal estate and effects, after payment of the several legacies or sums of money hereinbefore given or bequeathed by me, unto the honorable commissioners for the time being of the sinking fund of the United Kingdom of Great Britain and Ireland, to be applied by them, according to the directions and regulations of the laws and statutes in force, for the time being, for regulating and applying that fund in or towards the extinction or reduction of the national debt of the said United Kingdom, or as near thereto as circumstances will permit."

The testator died in April, 1846.

The bill was filed by the executor of the testator against his next of kin, and the commissioners for the reduction of the national debt, for the administration of his estate.

It appeared by the master's report that the testator died possessed of the following items of property:—

First. Mortgages of turnpike tolls.

Secondly. Twenty shares in the Peak Forest Canal Company, an incorporated company, which had been constituted by the 34 Geo. 3, c. 26, under which it was declared "that the shares should be personal

¹ 20 Law J. Rep. (N. S.) Chanc. 234.

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estate, and transmissible as such, and should not be of the nature of real property."

Thirdly. Thirty-five shares in the Birmingham Waterworks Company, an incorporated company, which had been constituted by the 7 Geo. 4, c. 109, under which the company were authorized to purchase and hold lands, and under which it was declared "that the shares should be personal estate, and transmissible as such, and should not be of the nature of real property."

Fourthly. A large number of railway shares in different companies, which, by the acts of Parliament under which they were constituted, or the Lands Clauses Consolidation Act, were declared to be "to all intents and purposes personal estate, and transmissible as such, and should not be deemed of the nature of real estate."

Fifthly. Several railway debentures, one of which was of the following form: "The Sheffield, Ashton under Lyne and Manchester Railway Company promise to pay the bearer hereof at Messrs. Glyn & Co.'s, Lombard Street, 5000*l.*, value received; and that, until the same shall be paid, interest at 4½ per cent. shall be paid half yearly; as witness the corporation seal of the company." (The others being of the same form.)

Sixthly. 150 shares in the Manchester and Liverpool District Banking Company, constituted by a deed of settlement, under which the shares were declared to be personal estate, and under which the directors were authorized to invest money on the mortgage of real estate.

Seventhly. Several railway mortgages, of which the following is one, (the others being of a similar form:) "The Manchester and Birmingham Railway Company assign unto John Ashton, his executors, administrators, and assigns, the said undertaking, and all and singular the rates, tolls, and sums of money arising by virtue of the said act, and all the estate, right, title, and interest of the said company, to hold the same until the sum of 30,000*l.* shall be repaid with interest at 4½ per cent."

Eighthly. A large quantity of railway scrip.

It was admitted by all the defendants that the statements in the master's report were correct; but, the form of report being objected to by both sets of defendants as to the master's representations of the different items being, or not being, interests in land, exceptions were taken to it.

The exceptions now came on to be heard.

Mr. Roundell Palmer and *Mr. Hobhouse*, for the exceptions, having stated the case, —

Knight Bruce, V. C., asked if the facts in the report were admitted.

On this being assented to, —

Knight Bruce, V. C., said that where exceptions related to only matters of law, and not to matters of fact, they merged, if he might

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use the expression, in the further directions. He should make no order on the exceptions, and his decision on the questions submitted to him would be only by way of declaration.

Mr. Roundell Palmer said he understood that it was intended, on the part of the commissioners, to raise the question whether the residuary bequest was "a charitable use."

The *Solicitor General*, for the commissioners, said, that it had been at one time intended to raise that question; but, after a due consideration of the point, and having regard to *Nightingale v. Goulbourn*, 5 Hare, 484; s. c. 16 Law J. Rep. (n. s.) Chanc. 270; 2 Phil. 594; 17 Law J. Rep. (n. s.) Chanc. 296, he had come to the conclusion to give it up. He also admitted that the turnpike tolls were within the act.

Mr. Roundell Palmer and *Mr. Hobhouse*. The canal shares, water-works shares, and railway shares, (being the shares in incorporated companies,) are within the provisions of the Mortmain Act, 9 Geo. 2. c. 36; the profit being derived from land, and from tolls arising from the use of land. There is certainly a conflict of authorities — *Sparling v. Parker*, 9 Beav. 450; s. c. 16 Law J. Rep. (n. s.) Chanc. 57, and *Walker v. Milne*, 11 Beav. 507; s. c. 18 Law J. Rep. (n. s.) Chanc. 288, decided by Lord Langdale, and *Hilton v. Giraud*, 1 De Gex & Sm. 183; s. c. 16 Law J. Rep. (n. s.) Chanc. 285, and *Thompson v. Thompson*, 1 Coll. 381; s. c. 13 Law J. Rep. (n. s.) Chanc. 455, decided by this court, are against the next of kin; but the cases of *Howse v. Chapman*, 4 Ves. 542, *Tomlinson v. Tomlinson*, 9 Beav. 459, and *Myers v. Perigal*, 16 Sim. 533; s. c. 18 Law J. Rep. (n. s.) Chanc. 185,¹ are in their favor. It is to be remarked that *Tomlinson v. Tomlinson*, though not reported until after *Sparling v. Parker*, had preceded it by many years: and that this court has followed the decisions of Lord Langdale. The debentures are also within the act, as giving the holders a right to a receiver. *Russell v. The East Anglian Railway Company*, 3 Mac. & Gor. 104; 1 English Reports, 101; and see *post*. The shares in the banking company, an unincorporated company, are also within the statute. *Myers v. Perigal*. The railway mortgages also are within the statute. *Finch v. Squire*, 10 Ves. 41. [On this point, *Doe d. Myatt v. The St. Helen's and Runcorn Gap Railway Company*, 2 Q. B. Rep. 364; s. c. 11 Law J. Rep. (n. s.) Q. B. 6, was also referred to.] Lastly, the railway scrip is also within the act.

Mr. Russell, *Mr. Edward Bury*, *Mr. Calvert*, and *Mr. Baggallay*, on the same side.

The *Solicitor General* and *Mr. W. M. James*, for the commissioners, were not called upon.

KNIGHT BRUCE, V. C. I do not understand that any case has been

¹ This case has been heard, on appeal, by the lord chancellor, and awaits his decision.

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decided since *Sparkling v. Parker*, at variance with it, or that any case has been decided since *Walker v. Milne*, at variance with it. A great deference is certainly due to these cases, but they are not necessarily binding on the court. If, then, I should have a strong and undoubting opinion that they are erroneous, I ought to decide otherwise than in conformity with them. But I have not such an opinion. On the contrary, if the case had now come before me for the first time, clear of all decisions, I should decide respecting the canal and railway shares as Lord Langdale has done. I decide, then, accordingly with reference to these shares.

With regard to the debentures, I think that they cannot be deemed to come within the act. There is no reference in the form of the debentures to any interest or benefit arising from real estate, and it has not been shown by extraneous means that that character belongs to them. It is a personal obligation to pay a debt, which may certainly be enforced against property, but not otherwise than as in the case of other personal obligations.

Then, as to the shares in the banking company. It is contended that they are within the act, because land may be acquired for the offices for carrying on the business of the company, or for investment, or in respect of bad debts. This kind of property, however, is not the object of the formation of the company, which is merely a trading society. I think that it is a reasonable construction that such shares should not be held obnoxious to it merely from the fortuitous possession of real estate. The words of the 1st section are, "manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments." Certainly property of this description does not come within these words. Then, the words of the 3d section are, "lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or any estate or interest therein, or of any charge or incumbrance affecting or to affect the same." I think that it would not be a reasonable interpretation of this act to say, that these shares are an estate or interest in land under the words which I have mentioned. I regard the case which has been cited, *Myers v. Perigal*, with great respect; but I cannot agree with such an extended construction. Here, then, is an existing authority from which I deem it right to depart; which I accordingly do.

I think also that the scrip is not within the words. There is no binding authority on that point.

The only remaining cases are the mortgages of railway undertakings, which I do not decide in favor of the commissioners, and the counsel for the commissioners must confine their observations to them.

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The *Solicitor General* and *Mr. W. M. James* then contended that the railway mortgages were not within the act. *Walker v. Milne.*

KNIGHT BRUCE, V. C. Railway shares, I think, are not covered by the words of the act, and are not within the meaning of it; but mortgages of the undertakings and the tolls proceed from the corporation directly, and plainly are an incumbrance on, and directly and immediately charge, hereditaments, namely, tolls and the land itself from which the tolls are obtained.¹

QUENNEL V. TURNER.²

March 17 and 18, 1851.

Will — Construction — Bequest — Misdescription — Devise — “Estate” — Copyholds — Annuity — Primary Fund for Payment.

G. T. was entitled to a life interest in freehold and copyhold estates, and also in three sums of stock; the legal estate in the freeholds was vested in trustees, but the copyholds had never been surrendered to them, and many of the freehold and copyhold lands were let together; the three sums of stock were standing in the names of the trustees in the Bank of England. G. T. was also absolutely entitled in remainder to moiety of the freehold and copyhold estates, and in the stock. G. T., upon his second marriage, by a covenant and his bond, secured an annuity of 200*l.* a year to his wife for life, and by his will he confirmed the settlement, and said, “I charge all and every my freehold hereditaments and estate and moneys standing in my name in the public funds with the payment of the annuity, to my wife; and subject to the said annuity, I devise and bequeath the same freehold hereditaments and estate and moneys in the funds to my niece and godchild, S. Q., her heirs, executors, administrators, and assigns, with remainder to her two sisters, &c. All the rest and residue of my real and personal estate, subject as to my personal estate to the payment of my just debts, &c., and legacies, I devise and bequeath unto my wife, her heirs, executors, administrators, and assigns.” The testator had no moneys standing in his name, and upon a suit by the devisee:—

Held, that the testator meant his interest in the stock standing in the name of the trustees, to which he was entitled in remainder:—

Held, also, that the personal estate, as the primary fund for payment of the annuity, was not exonerated by the charge made upon the freeholds and the moneys in the funds:—

Held, also, in the absence of any intention apparent on the will, that the word “estate” did not include the copyholds, and that they did not pass.

By indentures of lease and release, bearing date respectively the 3d and 4th of June, 1796, being the settlement made in contemplation of a marriage between Sally Clifton and the Rev. George Turner; the release being made between Sally Clifton of the first part, the Rev. George Turner of the second part, and John Hilton, John Peyto Shrubbs, and the Rev. John Roberts of the third part, the said Sally Clifton granted and released divers freehold hereditaments situate near Guildford, in the county of Surrey, to the said trustees, their

¹ It was at the hearing stated that it was the intention of the parties to carry an appeal in this case directly to the house of lords. The amount of the property in question was about 250,000*l.*

² 20 Law J. Rep. (N. S.) Chanc. 237.

heirs and assigns; and George Turner and Sally Clifton covenanted, within one month after the solemnization of the marriage, to surrender certain copyhold lands held of the manors of Paddington Pembroke, Westcott, and Dorking, in the county of Surrey, to which Sally Clifton was entitled, unto the said trustees, that they might be admitted. And the said Sally Clifton also assigned divers leasehold premises unto the said trustees; and also a bond, dated the 24th of August, 1787, and all moneys thereby secured, and a sum of 1017*l.* 0*s.* 11½*d.*, secured by an indenture of mortgage, dated the 2d of July, 1783. It was also agreed that the sum of 2725*l.*, 5*l.* per cent. consols, standing in the name of the said Sally Clifton, should be transferred to the trustees; and it was declared that the freeholds, copyholds, leaseholds, and all other the personal estate should be held by the trustees upon trust to pay the rents and profits, dividends, and income, to George Turner, for life; and in case there should be only one child of the marriage, if it should be a son the said trustees were to transfer the sum of 1017*l.* 0*s.* 11½*d.* and 2725*l.*, 5*l.* per cent. consols, and the dividends and interest thereof, unto such persons as she, the said Sally Clifton, should, at any time, by deed or will appoint; but in case there should be only one child of the marriage, and it should be a daughter, the trustees were to stand seized and possessed of the freehold, copyhold, and leasehold hereditaments and premises, and the annuities, in trust for such persons as Sally Clifton should by deed or will appoint; and in case there should be no such son or daughter, nor any issue of such son or daughter, living at the time of the decease of the survivor of the said G. Turner and Sally Clifton, then that the said trustees should, after the death of both, convey, surrender, assign, transfer, and pay the freehold, copyhold, and leasehold messuages, lands, &c., and the annuity, stocks, funds money on mortgage and premises, and the rents, issues, dividends, interest, profits, and produce thereof, upon such trusts and for such purposes as were therein previously declared concerning the same, in case there should be only a son or only a daughter of the said marriage. The settlement also gave the trustees a power of sale and exchange, with the consent of G. Turner and Sally his wife, and the survivor of them, and it was declared that the moneys produced by the sales should be laid out in the purchase of lands, which were to be settled to the uses thereby declared.

The marriage was duly solemnized, and on the 2d of January, 1797, Sally Turner, by virtue of the power contained in the indenture of settlement of the 4th of July, 1796, duly made her will in the presence of three witnesses, and upon failure of the limitations in the settlement in favor of her son and daughter and their issue, she directed, limited, and appointed the sum of 500*l.* to be raised from the sale of part of the sum of 2725*l.*, 5*l.* per cent. annuities, for the use and disposal of her cousin Charlotte, one of the daughters of the Rev. Dr. James Weller, her executors, administrators, and assigns; and the testatrix directed the trustees of the settlement to transfer so much of the 5*l.* per cent. annuities as would be sufficient to raise and pay the 500*l.*; and as to the remaining part of the said 2725*l.*, 5*l.* per cent.

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annuities, the testatrix bequeathed and appointed the same, and the 1017*l.* 0*s.* 11*d.* due on mortgage, and all other moneys in the settlement, and all interest and dividends then due on the same, unto and between her husband George Turner and her cousin Cary Hampton Weller, their executors, administrators, and assigns, in equal shares and proportions. And the said testatrix directed the said trustees to pay, assign, or transfer the said respective sums and moneys to G. Turner and C. H. Weller, or to their respective executors, administrators, and assigns. And the said testatrix directed and appointed all the freehold, copyhold, and leasehold messuages, &c., and hereditaments and annuity of which she was seized at the time of making the settlement, and the rents, issues, and profits thereof, unto and for the absolute use and benefit of her husband G. Turner and her cousin C. H. Weller, their heirs, executors, administrators, and assigns, forever, as tenants in common.

In 1798, Messrs. Hilton, Shrubb, and Roberts had received the whole sum of 1017*l.* 0*s.* 11*d.*, and invested the same in the purchase of 697*l.* 1*s.* 8*d.* and 690*l.* 11*s.* 6*d.*, old 5*l.* per cent. bank annuities, in their names.

In May, 1799, Messrs. Hilton, Shrubb, and Roberts, in pursuance of their power, sold certain parts of the hereditaments for 950*l.*, which they invested in their names in the purchase of 1696*l.* 8*s.* 7*d.*, reduced 3*l.* per cent. annuities; 1312*l.* 2*s.* 6*d.* and 58*l.* 13*s.* 4*d.*, parts of which were subsequently applied for the redemption of the land tax upon some of the settled estates, and left a sum of 325*l.* 11*s.* 9*d.* reduced 3*l.* per cent. annuities only.

Messrs. Shrubb and Roberts survived Mr. Hilton, and in May, 1819, they, during the life of Sally Turner, sold other parts of the settled estates for 1500*l.*, which was invested in the sum of 2155*l.* 14*s.* 5*d.*, 3*l.* per cent. reduced annuities, in their names.

In 1805, 1808, and 1817, various parts of the settled estates were exchanged for other hereditaments.

On the 9th of May, 1819, Sally Turner died, without having altered or revoked her will, there never having been any issue of her marriage with George Turner.

C. H. Weller, by his will, dated the 13th of May, 1819, after devising a house at Brighton to his sisters Mary and Charlotte Weller and their heirs, as tenants in common, gave all the rest and residue of his estate and effects, both real and personal, of what nature or kind soever, after payment of his just debts, funeral and testamentary expenses, to his said sisters, equally to be divided between them, their executors, administrators, and assigns, and he appointed them executrices of his will.

C. H. Weller died on the 20th of May, 1819, without having revoked his will, which was proved by both the executrices.

On the 7th of December, 1820, in contemplation of a marriage between George Turner and Ellen Meliora Hilton, a settlement was executed by which 6000*l.*, her fortune, was secured for her benefit. George Turner, by the same deed, also agreed to secure her an annuity of 200*l.* a year for her life, in case she should survive him; and by

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a bond of even date, George Turner became bound to Adam Chadwick and John Roberts in the penal sum of 3000*l.*, conditioned to be void on payment by the heirs, executors, or administrators of the said George Turner, to the said Ellen M. Turner in case she should survive him, for the remainder of her life, of one annuity of 200*l.* a year, free from taxes and without any abatement. It was also, by the indenture of settlement, declared that the annuity of 200*l.* a year was to be taken in lieu of all dower and thirds.

This marriage was duly solemnized in January, 1821, and John Roberts having died, by indentures of release and appointment, dated the 10th and 11th of September, 1823, and made between Joseph Shrubbs of the first part, George Turner of the second part, and N. Hilton and Percival Walsh of the third part, Messrs. N. Hilton and P. Walsh were appointed trustees of the settlement of the 4th of June, 1796, in the place of Joseph Shrubbs, John Hilton, and John Roberts, and the real and personal estate, with the exception of the copyhold hereditaments, (which had never been surrendered,) were vested in N. Hilton and P. Walsh upon the trusts of the settlement of 1796.

On the 28th of May, 1824, Adam Hilton was appointed a trustee of the settlement of 1796, in lieu of N. Hilton, who had died, and in like manner the trust estate was again vested in P. Walsh and Adam Hilton.

At the date of the will of George Turner, and at the time of his death, the estates and property subject to the trusts of the indenture of settlement of the 4th of June, 1796, consisted of certain farms, some of which comprised lands of freehold and copyhold tenure, but which were let together, and occupied as one farm, and of divers freehold and copyhold cottages and lands, and of a freehold rent charge of 2*l.* 8*s.* issuing out of Hawkhurst Farm. It also consisted of 4319*l.* 4*s.* 8*d.*, new 4*l.* per cent. annuities, of 2481*l.* 6*s.* 2*d.*, reduced 3*l.* per cent. bank annuities, of 130*l.* 14*s.* 4*d.*, 3*l.* 10*s.* per cent. annuities, standing in the names of Adam Hilton and P. Walsh in the books of the Bank of England, but by the trusts of the settlement the sums of 2481*l.* 6*s.* 2*d.* and 130*l.* 14*s.* 4*d.* were to be laid out in the purchase of real estate, to be settled upon the uses to which the lands sold were subject.

George Turner, by the will of his wife Sally, dated the 2d of January, 1797, was entitled to a moiety of the freehold and copyhold estate, and to a moiety of the sums of stock, subject only to the legacy of 500*l.* to Charlotte Weller, and on the 24th of July, 1835, he, by his will, after confirming the settlement made on his second marriage, said, "I do hereby charge and make chargeable all and every my freehold hereditaments and estate in the county of Surrey, and moneys standing in my name in the public funds, with the payment of the said annuity to my wife, which is to be paid free from all expenses and deductions whatsoever. And subject to the payment of the said annuity, I give, devise, and bequeath the same freehold hereditaments and estate and money in the public funds to my niece and godchild Sarah Quennell, her heirs, executors, administrators, and assigns, forever, provided that in case my said niece and

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godchild Sarah Quennell shall depart this life, leaving her sister Mary Quennell and Elizabeth Calhoun, or either of them, her surviving, then I give, devise, and bequeath the same freehold hereditaments and estate in the county of Surrey, and money in the public funds, unto her sisters, the said Mary Quennell and Elizabeth Calhoun, to hold to them and the heirs, executors, administrators, and assigns of such survivor forever." The testator then devised to his three nieces and their heirs certain freehold cottages in Sussex, and as to the residue of his real and personal estate, subject as to the personal estate to the payment of his debts and legacies, &c., he gave it to his wife, her heirs, executors, administrators, and assigns. The testator then gave several legacies to various persons.

The testator died on the 1st of December, 1840, without having altered his will, leaving his wife E. M. Turner his sole executrix, who proved the will, and Sarah Quennell, Elizabeth Calhoun, and Mary Quennell, who were his co-heiresses at law, him surviving.

E. M. Turner also procured letters of administration to Sally Turner with the will annexed. George Turner had not any moneys standing in his name in the public funds, either at the date of his will or at any time subsequently.

E. M. Turner claimed the money in the funds, standing in the names of Messrs. Walsh and Hilton, as residuary legatee, and she refused to forego her annuity, which was charged as well on the funded property as on the real estates.

Out of these circumstances three questions arose: First, whether Sarah Quennell was not entitled to one moiety of the moneys in the funds, to which the testator was entitled in reversion expectant on his death. Secondly, whether the personal estate was exonerated from the payment of the annuity of 200*l.* to the testator's wife, in consequence of its being charged by the will on the freehold estates in the county of Surrey, and the moneys in the funds. And, thirdly, whether the copyhold premises were included in the word "estate" and passed by the devise.

Mr. Turner and *Mr. Piggott*, on behalf of the plaintiff, on the first point cited: *Dorr v. Geary*, 1 Ves. sen. 255. *Dobson v. Waterman*, 3 Ves. 308, *n.* *Hewson v. Reed*, 5 Mad. 451. *Gallini v. Noble*, 3 Mer. 691. *Penticost v. Ley*, 2 Jac. & W. 207. *Selwood v. Mildmay*, 3 Ves. 306. *Lindgren v. Lindgren*, 9 Beav. 358; s. c. 15 Law J. Rep. (N. S.) Chanc. 428.

On the second point: *Boughton v. James*, 1 Coll. 26; s. c. 1 House of Lords Cases, 406. *Boote v. Blundell*, 1 Mer. 193; s. c. 19 Ves. 509. *Shuttleworth v. Greaves*, 4 Myl. & Cr. 35; s. c. 8 Law J. Rep. (N. S.) Chanc. 7. *Miller v. Little*, 2 Beav. 259.

Mr. Walpole and *Mr. T. S. Clarke*, for James Calhoun and Elizabeth his wife, who were in the same interest with the plaintiff, on the first point cited: *Mackinley v. Sison*, 8 Sim. 561. *Sheffield v. Von Donop*, 7 Hare, 42; s. c. 17 Law J. Rep. (N. S.) Chanc. 481.

On the second point: *Ouseley v. Anstruther*, 10 Beav. 453. *Ryall*

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v. *Hannan*, 10 Beav. 536 ; s. c. 16 Law J. Rep. (n. s.) Chanc. 491. 1 Roper on Legacies, 265, 3d ed. *Davies v. Ashford*, 15 Sim. 42 ; s. c. 14 Law J. Rep. (n. s.) Chanc. 473.

On the third point, respecting the copyholds : *Car v. Ellison*, 3 Atk. 73. *Edwards v. Barnes*, 2 Bing. N. C. 252 ; s. c. 5 Law J. Rep. (n. s.) C. P. 32.

Mr. Roupell and *Mr. Amphlett*, for E. M. Turner, the testator's widow and residuary legatee. It is necessary to consider what it was the testator gave, and then to apply that to the state of the property, and to consider whether, under the circumstances, any evidence is admissible. The gift was not specific. There was no description to show that the testator contemplated any specific property, or that he referred to any property existing at the date of the will. It merely referred to moneys standing in his name at the time of his death ; it was a general gift of personal estate of a particular denomination which he might have at the time of his death, and funds purchased after the date of the will would have passed, and have satisfied the gift. *The Dean and Chapter of Christchurch v. Barrow*, Amb. 641. *Browne v. Groombridge*, 4 Madd. 495. In this case there is no ambiguity to which parol evidence can refer ; the modern cases, also, have narrowed the admissibility of parol evidence. *Lindgren v. Lindgren* and *Selwood v. Mildmay* do not apply. The gift is dependent upon things as they stood not at the date of the will, but at the death of the testator. The other cases cited are to be distinguished from this ; in those there was an intention to pass a specific thing — moneys at the bank ; the description was sufficiently accurate to identify the fund referred to. As to the second point respecting the annuity, it is a debt separated and distinguished, and is charged upon particular property. In *Hancox v. Abbey*, 11 Ves. 179, upon a devise in trust to sell and pay off a mortgage and raise another sum, which the testator gave to his daughters, the personal estate was exempted from the payment of those two sums, without express words, upon the plain intention. The debt and legacies were charged on a particular part of the personal estate. The only distinction in this from the cases of *Choat v. Yeats*, 1 Jac. & W. 102, and *Welby v. Rockcliffe*, 1 Russ. & M. 571 ; s. c. 8 Law J. Rep. Chanc. 142, is, that there is a general charge of debts in an anterior part of the will. If the payment of the annuity is to be distributed over the personal estate, then it will fall upon the widow. With respect to the copyholds, the words "freehold hereditaments and estate" are conjunctive, and not disjunctive ; and there is nothing in the will which shows an intention that they should apply to the copyhold lands. *Miller v. Travers*, 8 Bing. 244. *Day v. Trig*, 1 P. Wms. 286. *Evans v. Cockeram*, 1 Coll. 428. 1 Jarman on Wills, 365. *Wilde v. Holtz-meyer*, 5 Ves. 811. *Doe d. Smith v. Galloway*, 5 B. & Ad. 43 ; s. c. 2 Law J. Rep. (n. s.) K. B. 182.

Mr. Turner, in reply.

THE MASTER OF THE ROLLS. Every case of this kind is necessarily

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attended with a great deal of trouble and anxiety ; such a variety of views arises, and the words used are capable of so much qualification, that it is very difficult for the mind to arrive at a conclusion at once satisfactory to itself and to the parties.

The testator was entitled for his life to the dividends and interest of three sums of stock, which were standing in the names of trustees ; he was also absolutely entitled in remainder to one moiety of the stocks, the entirety of which stocks was subject to a charge of 500*l.* in favor of Charlotte Weller ; he was also entitled to certain copyhold estates. Upon his second marriage, he covenanted to secure an annuity of 200*l.* a year for his wife for life, in case she should survive him, *and this was secured by his bond.* Such being his interest, he made his will, upon which several questions are now raised. The testator certainly had no moneys in the funds standing in his own name : could he then be considered as having meant to refer to money in the public funds which he might acquire subsequently to the date of his will ? Or could he be considered as referring to moneys which he supposed he had in the public funds in his name at the time he made his will ? The words "all and every my freehold hereditaments and estate in the county of Surrey, and moneys standing in my name in the public funds," are no doubt ambiguous.

It has been argued that this means a general legacy, that would have been satisfied by means of moneys acquired, and procured to be standing in his name in the public funds after the date of his will ; but it seems to me that what he meant to allude to here was, "my moneys standing in my name in the public funds ;" if it were so, then it would be considered as a specific legacy. His intention, therefore, was to give something then standing, or supposed to be standing, in his name in the public funds at the time he made his will ; but what was it ? He had nothing except what was limited as I have mentioned ; and I think he must be considered as having intended to give what he had, namely, his interest in remainder in the one moiety of the stocks, subject only to the charge of 500*l.*, and such appears to me the conclusion I ought to arrive at upon the authority of the several cases.

The next point is, whether the personal estate was exonerated from the payment of the annuity of 200*l.* : upon this I have less doubt ; and I think he intended only to charge the personal estate, which is here introduced as a charge, and, on the authority of the late cases, that he cannot be considered particularly as having intended to exonerate the personal estate from that which is considered to be its natural burden, as it is the primary fund, which is applied in this court for the satisfaction of debts. I think, therefore, that no more was meant than to make that charge.

Upon the remaining point I concur in the argument of the defendants ; the words used in the gift do not at all apply, and do not necessarily lead to an inference that the testator meant to give the copyhold estates. The words "freehold hereditaments and estate" are no doubt strong enough to carry them all, provided there was a

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manifestation of the intention, which I think there is not; and, therefore, my opinion is, that these copyholds do not pass by the will, and there must be a declaration to that effect.

The case, however, is such that I think the costs of all parties ought to come out of the residuary estate.

HAWKES v. THE EASTERN COUNTIES RAILWAY COMPANY.¹

March 14, 1851.

*Railway Company — Specific Performance — Tenant for Life —
Lands Clauses Consolidation Act — Disabilities.*

The E. C. Railway Company had a bill before Parliament for making a railway from W. to S., with a line diverging from the main line to N. One of the objections to the bill was, that the diverging line would cross another railway line. When the bill was in committee it was ascertained that this objection would be removed, if the company were to obtain an estate which stood settled on A for life, with remainders over, which estate, however, by their bill they would not be authorized to buy. An agreement was entered into between the company and A, by which the company agreed to purchase this estate from A, and to perform all such acts as might enable A to sell the estate. The bill was passed, without obtaining any powers to purchase A's estate, and omitting the diverging line. The line from W. to S., and every thing connected with it, were afterwards abandoned by the company. In a suit by A against the company for a specific performance of the agreement:—

Held, that they were bound to perform it.

HENRY HAWKES, by his will, dated the 25th of February, 1836, devised a mansion and a small estate, consisting of about six acres, near Spalding, in Lincolnshire, to his son Henry Hawkes, the plaintiff in this suit, for life, with remainders over, and died soon after.

In 1847, the Eastern Counties Railway Company had a bill before Parliament for making a railway from Wisbeach to Spalding. The line of the railway passed just within the verge of Mr. Hawkes's estate, and the line of deviation passed through the centre of it, so that Mr. Hawkes, if the act of Parliament had passed, would have had the power of selling and conveying only a part of this estate, and would not have had the power of selling the whole.

It was a part of the scheme of this act that there should be a line diverging from the main Wisbeach and Spalding line to join the Ambergate, Nottingham, and Boston line. This diverging line having been opposed in committee, on the ground of its crossing the London and York line, the company directed their agents to inquire if any plan could be adopted for effecting a junction without this defect. An inquiry was accordingly made, and it was ascertained that, if the whole of Mr. Hawkes's settled property and two other properties were placed entirely at the disposal of the company, an unobjectionable divergent line of junction might be made.

¹ 20 Law J. Rep. (N. S.) Chanc. 243.

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It was then determined by the company that Mr. Hawkes's property should be secured. For this purpose an agreement, dated the 27th of May, 1847, was made between the Eastern Counties Railway Company and Mr. Hawkes. This agreement commenced in the following terms : —

“Whereas the said company are now promoting a bill before Parliament, intituled ‘A Bill to enable the Eastern Counties Railway Company to make a railway from Wisbeach to Spalding,’ &c. And whereas the said proposed railway is intended to pass near to the residence of the said Henry Hawkes, situate at Spalding, aforesaid, in such a manner as will most seriously damage the same, and render it unfit for habitation. And whereas the said Henry Hawkes has hitherto opposed the passing of the said bill into a law, but has consented to withdraw his opposition upon the said company entering into the agreement hereinafter contained. Now, it is hereby agreed by and between the parties hereto that, in the event of the said bill in its present or any amended, modified, or altered form for the like objects, or any or either of them, (and to which the said Eastern Counties Railway Company shall be parties or promoters,) passing into a law, the said Eastern Counties Railway Company, their successors or assigns, shall and will purchase, and they do hereby in such case agree to purchase, of and from the said H. Hawkes and his heirs, and the said H. Hawkes and his heirs shall and will sell, and he doth hereby accordingly agree to sell to the said company, their successors or assigns, all that capital messuage, &c., (describing it,) for the price of 8000*l.*, to be paid by the said company within eighteen calendar months next after the passing of such bill as aforesaid. And further, that, in addition to such purchase money or sum of 8000*l.*, the said company, their successors or assigns, shall and will at the same time pay to the said H. Hawkes, his executors, administrators, and assigns, the sum of 5000*l.*, as a compensation for the personal annoyance and inconvenience of compulsory eviction from his said residence. And further, that, inasmuch as the said H. Hawkes, under the will of his late father, is only tenant for life of the said capital messuage, and of the greater part of the said hereditaments, with remainders over in strict settlement, the said company will obtain all such powers and authorities, and do and perform all acts and things, and adopt all such measures, and pursue all such courses, either in or by such bill as aforesaid, or otherwise, as are, is, or shall or may be necessary or required for enabling the said H. Hawkes and his heirs, and all other necessary parties, to sell and convey, and the said company to purchase, the said hereditaments and premises from the said H. Hawkes and his heirs, so as the same may become vested in the said company on payment of the said several sums aforesaid, for an estate of inheritance in fee simple in possession.”

This agreement was under the seal of the company. The company then, feeling secure as to their obtaining the new junction line at some future period, agreed to give up the divergent line which had been marked out in the plan deposited by them for the purposes of their act.

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The act in question, intituled "An Act to enable the Eastern Counties Railway Company to make a railway from Wisbeach to Spalding," received the royal assent on the 22d of July, 1847. By the 13th section of that act, it was enacted that nothing in that act contained should be held to authorize the company to make the railway delineated in the plan between the divergence there marked and the Ambergate, Nottingham, and Boston Railway. By the 14th section the company were authorized to purchase for extraordinary purposes, connected with the said railway, any quantity of land not exceeding thirty acres. By the 15th section it was enacted, that the powers of the company for the compulsory purchase of lands should not be exercised after the expiration of three years from the passing of the act.

The Wisbeach and Spalding line was subsequently abandoned altogether, and no powers were ever obtained to enable Mr. Hawkes to make an effectual conveyance of his estate, and the company, having no occasion for it, declined to take any further steps about it.

This was a suit instituted by Mr. Hawkes against the company for a specific performance of the agreement made with him.

By the decree made at the hearing of the cause, it was declared that the contract should be specifically performed, and that it should be referred to the master to inquire whether a good title could be made to the property, and when such good title was first shown, and, in making such inquiry, he was to have regard to the said contract, and particularly to the clause therein contained relating to the property of which the plaintiff was therein mentioned to be tenant for life, under the will of his father, and to the provisions of the Lands Clauses Consolidation Act, 1845.

The master reported that a good title could be made, and was first shown on the 4th of May, 1850. Exceptions were taken to this report by the company. The exceptions now came on to be heard.

Mr. Russell, Mr. Malins, and Mr. Grove opened the exceptions.

Mr. Wigram and Mr. Follett, for the plaintiff.

Mr. Russell, in reply. First, under the 7th section of the Lands Clauses Consolidation Act, 8 Vict. c. 18, a tenant for life has the power of contracting for the sale of lands in which he has a limited interest; but, then, such lands must be lands which a company is authorized to purchase under an act *already passed*. When this contract was made the special act had not been passed, and, consequently, there was no power for the company to contract, or for Mr. Hawkes to sell. Secondly, the 9th section of the Lands Clauses Consolidation Act enacts that, where a contract has been entered into by a person under disability, the price shall not be less than what shall be fixed upon by two surveyors to be nominated by the parties. Here no valuation has been made, and thus the contract is vitiated.

[*Knight Bruce, V. C.*, said, that he did not consider that the contract was void in consequence of such an omission, and that, if the

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company desired, a valuation might still be made under the section in question.]

Thirdly, the contract here is for the purchase of the whole estate. The line of deviation having passed through the centre of the property, Mr. Hawkes had, under the special act, the power of selling a part only, and had no power to sell the remaining part not within the powers of the special act. The contract cannot be divided, and must, therefore, wholly fail. Fourthly, Mr. Hawkes is only tenant for life, and, as he has no power under the act to sell the whole estate, he can only confer a life estate. Is the company then to be subjected to the hardship of giving the price of the fee and getting only a life estate?

[*Knight Bruce*, V. C., said, that the purchase money would be paid into court, and certainly the persons entitled in remainder would not be allowed to get it out without confirming the purchase.]

Even if this be so, they would have to give the price of the fee, and get back something that was not as good as the fee. With reference to the 14th section of the special act, by which the company are authorized to take thirty acres for extraordinary purposes, that must be held to apply to such purposes as stations, &c., and cannot be considered as giving the company power to take, and Mr. Hawkes to sell, the estate in question.

KNIGHT BRUCE, V. C. For the purpose of this objection, I assume that the testator was seized in fee of the estate, and had a good title to devise it. That being so, the vendor is tenant for life in possession. The objection arises upon an interest, created by the will, to take effect after the expiration of that tenancy for life. Now, here, the body who contracted with this tenant for life contracted with notice of this circumstance. It is by no means new in this, or any other court, that a man, with knowledge of an objection to title, may so act as to waive it. The purchasers here knew that, as tenant for life, without special powers, or without being placed in particular circumstances, he could not sell more than that estate for life. Knowing this, they took it upon themselves to enter into the contract. The language used is this: "And further, that, inasmuch as the said Henry Hawkes, under the will of his late father, is only tenant for life of the said capital messuage, and of the greater part of the said hereditaments, with remainders over in strict settlement, the said company will obtain all such powers and authorities, and do and perform all acts and things, and adopt all such measures, and pursue all such courses, in or by such bill as aforesaid, or otherwise, as are, is, or shall or may be necessary or required for enabling the said H. Hawkes and all other necessary parties to convey, and the company to purchase, the said hereditaments from the said H. Hawkes; so that the same may become vested in the company, on payment of the said several sums aforesaid, for an estate of inheritance in fee simple in possession." The purchasers so contract, and they omit and fail to perform it, and say that, by reason of this tenancy for life, the vendor has no title. The objection is not an honest

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one, and I overrule it accordingly. The terms of the decree will require some care.

By the decree, after the ordinary directions as to overruling the exceptions, computing interest and taxation of costs, proceeded as follows:—

“ And the plaintiff, by his counsel, submitting to have the whole of the said sums of 8000*l.* and 5000*l.*, mentioned in the said agreement, treated as if the same were purchase money arising from estates devised to the uses of the will of H. Hawkes the father; and the defendants declining to state any election, or to express any wish, as to what account, or in what manner, the said moneys should be paid; and the defendants not requiring that a valuation of the said premises, or any part thereof, by two surveyors, shall be made in the manner prescribed in the 9th section of the Lands Clauses Consolidation Act, 1845,— It is ordered, that, upon the plaintiff executing and delivering to the defendants, at the expense of the defendants, according to the said agreement, a proper conveyance of the said estate and premises contained in the said agreement, such conveyance to be settled, &c., the said defendants, the Eastern Counties Railway Company, do pay the said sums of 8000*l.* and 5000*l.*, making together 13,000*l.*, and the interest thereon, &c., into the bank, &c., to the credit of ‘*Ex parte* The Eastern Counties Railway Company, in the matter of the Eastern Counties, Wisbeach to Spalding, Railway Act,’ subject to the further order of this court.”

MARKER v. MARKER.¹

April 17, 21, and 23, 1851.

Injunction—Equitable Waste—Ornamental Timber—Acquiescence by one of several Co-plaintiffs in Waste—Parties.

In cases of equitable waste in respect of ornamental timber, a court of equity confines its protection to timber proved to have been planted or left standing for ornament; and if the settler of the property has defined a standard of beauty or ornament, the court will interfere to prevent its being impaired. Therefore, where property was settled by deed to the use of trustees and successive tenants for life, with power to cut timber thereby expressed to be then standing and not being ornamental to the mansion-house or the pleasure grounds attached thereto, or any of the views or prospects of the same, of which timber it was thereby declared enough should always remain to preserve the beauty of the place unimpaired, the court, on the motion of the tenants for life in remainder, granted an injunction to restrain the tenant for life in possession from cutting certain timber which the evidence showed could not be cut without impairing the beauty of the place as it stood at the date of the settlement; but ordered the plaintiffs to give security to the tenant for life in possession for any loss or damage which he might sustain by reason of his being restrained from completing his contracts for the sale of such timber; and offered the latter a reference to the master to inquire what timber could be cut without impairing the beauty of the place as aforesaid.

Observations on the effect of acquiescence of co-plaintiff in matter complained of.

Marker v. Marker.

Purchasers of timber subsequently restrained from being cut not necessary parties to the bill for injunction.

THIS was a motion, on the part of the plaintiffs, for an injunction to restrain the defendant, Henry William Marker, his servants, workmen, and agents, from cutting down or felling, or permitting to be cut down or felled, seven hundred oak-trees, marked or numbered progressively from one to seven hundred in a catalogue in the bill mentioned, or any other trees, growing on the estates in the bill mentioned, which afforded or gave protection, shelter, or ornament to Combe House, in the bill mentioned, or the buildings or offices thereof, or the pleasure grounds attached thereto, or any of the views and prospects of the same. The trees in question were standing upon an estate of about one thousand seven hundred acres, and in which the mansion-house called Combe House was built. It appeared to be an old mansion-house situate on the slope of a hill, and built in the Elizabethan style, with a terrace front, and with shrubberies and pleasure grounds attached to it. This hill rose gradually at the back of the house, and there were upon the rise of the hill three woods, called "Cross Park Wood," "Combe Wood," and "The Kennel Coppice," which formed a belt or boundary to the pleasure grounds, and contained together about thirty-three acres. Above these woods there was a range of sheep pastures, and the higher summit of the hill was again clothed or fringed with wood. There was a footpath leading from the mansion-house through the Cross Park Wood to the rectory house and grounds, and this footpath was bounded by laurels and holly-trees. There were two rookeries in Combe Wood and Kennel Coppice, and the farm buildings lay at the back of Combe Wood; and five hundred of the seven hundred oak-trees proposed to be cut were standing in the above-mentioned woods, some few of them formed part of the rookeries, a few others immediately adjoined the rectory footpath, and the rest were trees standing, either separately or together in small numbers, in different parts of the woods. The remaining two hundred oaks stood either in hedgerows or fields, and were upon lands forming part of the estate. Eleven of these trees were described as standing in an elevated position above a small orchard which adjoined the lawn, and as being in view of the mansion and its approaches, and five others of them were described as being in a field adjoining the public road, running through the property from the village of Gittisham to the rectory, but not in view of the house. The position of the rest of the two hundred oaks did not appear by the affidavits.

The mansion-house and lands at Gittisham formed part of a large estate called the Combe Estate, which was formerly the property of Thomas Putt, and contained about four thousand acres. Thomas Putt died in the year 1787, having by his will devised the estate to uses in strict settlement. From the time of his death until the 24th of August, 1844, the estate was held by several tenants for life in succession, whose estates, under the limitations of his will, were impeachable of waste. On the 24th of August, 1844, Margaretta Marker came into possession of the estate as tenant in tail. She barred the entail of the estate, and by a deed dated the 11th of October, 1844,

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resettled it, in consideration of natural love and affection, to the use of the defendants Kekewich and Pulman, for the term of one thousand years, without impeachment of waste, save only the cutting and felling of ornamental timber as thereafter mentioned, and after the termination of the said term, and in the mean time subject thereto, and to the trusts thereof, to the use of her the said Margaretta Marker for her life, without impeachment of waste, save only the cutting and felling of ornamental timber, as thereafter mentioned, with remainder to the use of the defendant Henry William Marker for life, without impeachment of waste save as aforesaid, with remainder to the use of Henry William Putt Marker (son of the defendant Henry William Marker, and since dead without issue) for life, without impeachment of waste save as aforesaid, with remainder to the first and other sons of Henry William Putt Marker successively in tail male, with remainder to the use of the second and other sons of Henry William Marker successively in tail male, with remainder to the use of the plaintiff Thomas John Marker for life, without impeachment of waste save as aforesaid, with remainder to the use of the plaintiff Richard Marker, eldest son of the plaintiff Thomas John Marker for life, without impeachment of waste save as aforesaid, with remainder to the use of the first and other sons of the plaintiff Richard Marker in tail male, with remainder to the use of the plaintiff John Marker (second son of the plaintiff Thomas John Marker) for life, without impeachment of waste save as aforesaid, with divers remainders over, and with the ultimate remainder to the use of the defendant Henry William Marker in fee. By this deed, the trusts of the term of one thousand years were declared as follows: "And it is hereby agreed and declared between and by the parties to these presents, that the manors, capital and other messuages, tenements, farms, lands, advowsons, and other hereditaments herein limited to the said Samuel T. Kekewich and James Pulman, their executors, administrators, and assigns, for the said term of one thousand years, are limited to them, upon, and for the trusts, intents, and purposes following; that is to say, upon trust, in the first place by cutting and felling and converting into money all or any part or parts of timber now standing and growing on the said lands which is, or shall be, of full and ripe growth, and not ornamental to the mansion at Combe aforesaid, or the pleasure grounds attached thereto, or any of the views or prospects of the same, of which timber it is hereby declared that enough of the most ornamental shall always remain to preserve the beauty of the place unimpaired; or by demising, mortgaging, or selling the premises comprised in the said term, or any part or parts thereof (save and except the mansion-house of Combe as aforesaid, and the estates of Gittisham, &c., all of which are hereby expressly reserved from sale) for all or any part of the said term, or by all or any of the said ways or means or any other reasonable ways or means forthwith to levy and raise the clear sum of 10,000*l.* and to pay the same to the said Margaretta Marker, her executors, administrators, or assigns, or as she or they shall order and direct, for her and their own absolute benefit. And in the next place, from and immediately after the decease of the said Marga-

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retta Marker, by all or any of the ways and means aforesaid to levy and raise two several sums of 10,000*l.* and 10,000*l.*, and to pay the first of those two several sums of 10,000*l.* each unto the said Thomas John Marker, his executors, administrators, and assigns, for his and their absolute benefit, and to be by him and them received in satisfaction of any claim he may have on his brother, whether legally or otherwise, under the codicil to the last will and testament of his uncle, the Reverend Thomas Putt, deceased; and to pay over and apply the last of the two several sums of 10,000*l.* each to such persons and in such manner as Margaret Frances Smith, the wife of the Reverend George Townsend Smith, formerly Margaret Frances Marker, a daughter of the said Margaretta Marker, shall by any writing under her hand appoint." The deed also contained a proviso for a cesser of the term, powers of jointuring to tenants for life, and powers of leasing and of sale and exchange, and the usual provisions for the change and indemnity of the trustees.

It appeared that the tenants for life, under the will of Thomas Putt, although their estates were impeachable of waste, on several occasions cut down timber in three woods about the mansion-house both for use and for sale. But it was clear that there was a very large quantity of timber fit for cutting upon the estate, and particularly in the above-mentioned woods, when Margaretta Marker came into possession in August, 1844. Margaretta Marker did not, nor did the trustees during her life, cut down any trees upon the estate, except a few larch or fir-trees, which were cut by her, and no part of the 10,000*l.* secured to her under the trusts of the term was raised or paid in her lifetime. She died in July, 1846, having by her will appointed the defendant Henry William Marker to be her executor.

Upon the death of Margaretta Marker, the defendant Henry William Marker entered into possession of the estate as succeeding tenant for life under the resettlement. In January, 1849, 1900*l.* or thereabouts was raised by sale of timber upon the estate, and received by him as part of the 10,000*l.* secured to Margaretta Marker under the trusts of the term. Up to this period, no difference appeared to have arisen between the parties, but, some time in the year 1850, a question arose, whether, upon the true construction of the deed of the 11th of October, 1844, the timber made subject to the trusts of the term was not primarily liable for the three several sums of 10,000*l.* secured thereby; and for the purpose of determining this question, a bill was filed in this court in the name of the now infant plaintiff Richard Marker by Richard John Marker, his next friend, and demurrers were put into the bill. These demurrers were allowed by the vice chancellor Wigram, before whom they were argued, and who, it was stated, intimated an opinion that the estate comprised in the term, and not the timber made subject to the trusts of the will, was the primary fund for the payment of the sums of 10,000*l.* See *Marker v. Kekewich*, 19 Law J. Rep. (N. S.) Chanc. 492. The defendant Henry William Marker having, on the 10th of December, 1850, advertised the seven hundred oak-trees, which were in question on the present motion, with one hundred ash-trees, which had since been cut down upon the

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estate, for sale upon the 31st of December, the trustees on the 21st of that month filed their bill in this court against the defendant Henry William Marker and the plaintiff in the former suit, and the other parties interested under the settlement of October, 1844, praying that it might be declared, that according to the true meaning and construction of the said indenture of settlement, the plaintiffs, the trustees, were entitled to use and exercise a discretionary power in accordance with the trusts declared by the said indenture of settlement, as to the mode in which the three several sums of 10,000*l.* each thereby directed to be levied and paid, should be levied and raised, and that the plaintiffs, the trustees, had a discretionary power to raise and pay the same, or any part thereof, either by resorting to the timber of ripe and full growth, other than such as was ornamental to the said mansion-house of Combe, and the pleasure grounds attached thereto, or any of the views and prospects thereof, which were then standing or growing, or which, until the said money should be fully raised and satisfied, should be standing or growing on the said estates; and that the right of the said defendant, Henry William Marker, or any other of the defendants thereto, who under the limitations of the said indenture of settlement were made tenants for life of the said estates to cut or fell any such timber, was subordinate to the right of the plaintiffs, the trustees, to exercise such discretionary power; and that the said defendant Henry William Marker and his servants or agents might be restrained by the order and injunction of this court from cutting or felling any such timber, or selling or disposing thereof whilst the said moneys by the said indenture of settlement directed to be levied and raised were not raised; the plaintiffs, the trustees, being ready and willing, and thereby offering forthwith to take all measures and proceedings necessary or proper in accordance with the trusts and discretionary power vested in them by the said indenture of settlement for levying and raising the same moneys so far as the same then remained unsatisfied.¹ There were other parts of the prayer of the bill, but they did not (his honor said) appear to him to be material to the present question.

That bill was filed by Mr. Gidley, as solicitor for the trustees, Kekewich and Pulman, the then plaintiffs, and now defendants; and Mr. Gidley acted as solicitor for the present plaintiffs as the defendants in that suit, and as their solicitor in the present suit; and the timber advertised to be sold, including the oaks now in question, was clearly treated by this bill as not being ornamental to the mansion-house or pleasure grounds, or any of the views or prospects of the same, it being, probably, considered necessary so to treat it in consequence of the terms of the declaration of trust as to the ornamental timber. Upon the filing of this bill, application was made to Lord Cranworth for the injunction, but his lordship declined to grant it, the defendant Henry William Marker (who, his honor observed, was not only tenant for life, but also entitled as personal representative of Margaretta Marker to the unpaid parts of the 10,000*l.* secured to her under the trusts of the term) undertaking to account for the

¹ This was the suit of *Kekewich v. Marker*.

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produce of the timber if and as the court should direct The injunction having been thus refused, the seven hundred oaks and one hundred ash-trees were sold to different purchasers on the 31st of December last, and the ash-trees had been since cut down; and in that state of circumstances, the present bill had been filed by Thomas, John Marker, Richard Marker, and John Marker, the two latter of whom were infants, as tenants for life in remainder under the settlement of October, 1844, against Henry William Marker the tenant for life in possession under the same settlement, Kekewich and Pulman as trustees of the term, and George Townsend Smith and Margaret Frances his wife, as interested under the trusts of the term in the 10,000*l.*, thereby secured for the benefit of Mrs. Smith. The bill stated the settlement of October, 1844, and set forth in detail the trusts of the term. It alleged that the settled estates were not timber estates; that they consisted of a mansion-house with extensive buildings, offices, and pleasure grounds thereto attached suitable for the residence of the owner of the estates and used as such, of farms and lands let to tenants, and of a comparatively small portion of wood land; that for many years previously to the estates being put into settlement by Margaretta Marker, the timber growing thereon had been carefully preserved by the owners of the estates and allowed to remain uncut; and that there was at the date of the settlement, and at the death of Margaretta Marker, and that there then was, standing and growing on the estates, a large quantity of timber of full and ripe growth, and much more than was usual on estates of a like description.

It then stated the sale of the timber under which the 1900*l.* was raised, and the sale of the seven hundred oak and one hundred ash-trees on the 31st of December last. With reference to those trees, it charged that the principal portion of the trees so sold was standing in a wood near the mansion-house, and that the rest thereof were standing or growing in the hedgerows, or on the open lands on the said estate, and that some of the said trees were standing and growing within two hundred yards of the mansion-house, and that all the said trees so sold were ornamental to the mansion-house and grounds and the views and prospects of the same, and ought to have been preserved as such; and that a great part thereof afforded protection and shelter to the mansion-house and offices and the pleasure grounds of the same, and ought to have been preserved on that account. It further charged, that since the sale, the defendant, Henry William Marker, had permitted the purchasers of the ash-trees to enter upon the estate and cut and fell those trees; that he had received the price thereof from the purchasers and applied the same to his own use, or in satisfaction of the moneys directed to be levied and raised. It also charged that if the seven hundred oak-trees were allowed to be cut down, the mansion-house and the offices and buildings attached thereto would be deprived of the protection and shelter afforded thereby, which ought to be preserved, and the beauty of the same, and the pleasure grounds thereof, and the scenery, vistas, views, and prospects of the same would be greatly impaired, and

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that irreparable damage, spoil, destruction, and injury would be occasioned and committed to and upon the estates, and grievous wrong and injury done to the plaintiffs as the parties in remainder entitled to the estates after the defendant Henry William Marker; and it prayed that the defendant Henry William Marker might be restrained by the order and injunction of this court from cutting down or felling, or permitting to be cut down and felled, the seven hundred oak-trees, or any other timber growing on the estate which afforded or gave protection, shelter, or ornament to Combe House, aforesaid, or the outbuildings or offices thereof, or the pleasure grounds attached thereto, or any of the views and prospects of the same.

Notice of the present motion for an injunction was given before Vice Chancellor Lord Cranworth, and the motion was transferred to his honor Vice Chancellor Turner, by order of the lord chancellor.

Mr. Rolt and Mr. Fooks, for the motion, cited *The Marquis of Downshire v. Lady Sandys*, 6 Ves. 107. *Wombwell v. Belasyse*, *Ibid.* p. 110, n. a. *Lushington v. Boldero*, 6 Madd. 149. *Chamberlayne v. Dummer*, 1 Bro. C. C. 166. *Mann v. Stephens*, 15 Sim. 377. *Tulk v. Mozhay*, 11 Beav. 571; s. c. 1 Hall & Twells, 105; 18 Law J. Rep. (N. S.) Chanc. 83.

Mr. Bethell and Mr. Giffard, for the defendant H. W. Marker, against the motion, contended that the circumstance of the plaintiffs and other parties in the same interest having been parties to the suit of *Kekewich v. Marker* precluded them from obtaining the injunction sought by the present motion; that one of the present plaintiffs (Thomas John Marker) had acquiesced in the order made in the suit of *Kekewich v. Marker*, and that the co-plaintiffs in the present suit were bound on the present interlocutory application by the alleged acquiescence; that the plaintiffs had delayed making their present application; that the purchasers of the timber proposed to be cut were not parties to the present suit; and that the plaintiffs were not entitled to the injunction: first, upon the general doctrine of courts of equity in matters of equitable waste; and, secondly, under the special terms of the deed of the 11th of October, 1844.

On the question of want of parties, they cited *Carlisle v. The South Eastern Railway Company*, 2 Hall & Twells, 366; s. c. 1 Mac. & Gor. 689; 19 Law J. Rep. (N. S.) Chanc. 477.

Mr. Rolt replied.

April 23, 1851. TURNER, V. C., after stating the above facts, said: The question I have to consider is, whether the injunction ought to be granted as to all or any part of the timber, and if granted at all, whether upon any and what terms. Upon the argument on the motion before me several points were urged, upon the part of the defendant Henry William Marker, which do not involve the substantial merits of the case; and it may be convenient, in the first instance, to refer to those points.

It was contended, on the part of this defendant, that the conduct

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of the plaintiffs, apart from any question of acquiescence on their part, precluded them from all title to the injunction; that having been parties to the suit which was instituted by the trustees in which the timber in question was alleged not to be ornamental, they could not be permitted by the present bill to assert the right to it as being ornamental. But nothing further appears by the affidavits upon this subject than that Mr. Gidley, the solicitor for the trustees, the plaintiffs in that suit, acted also as solicitor for the present plaintiffs, as defendants in that suit. It would, I think, be going much too far to hold that defendants, and particularly the present plaintiffs, can be in any manner bound by the allegations of the bill upon the mere ground that they were represented in the suit by the same solicitor under whose instructions the bill was filed. It does not even appear that the plaintiff, Thomas John Marker, appeared upon the motion in this suit; and the fact, which is undoubtedly proved, that he interfered to impede the sale, does not appear to me to strengthen this part of the case.

Another objection to the motion was, that there had been acquiescence on the part of the plaintiff Thomas John Marker, and that acquiescence on the part of one of several plaintiffs precludes the interference of the court upon interlocutory applications as much as upon decree. I think the defendant's argument upon this subject is well founded; and that if a case of acquiescence on the part of the plaintiff Thomas John Marker was established, it would be a sufficient answer to the motion. In an unreported case before Lord Cottingham, when master of the rolls, where a bill was filed by several of the plaintiffs, some of whom were infants, against an executor, for the purpose of setting aside a release, and compelling him to account for money alleged to have been improperly withheld when the release was executed, he refused to entertain a motion for payment of money into court, upon the ground that some of the above plaintiffs had, with full knowledge of the circumstances, acquiesced in the retainer; and I think that, upon principle, the court ought not to interfere at all, if it be fully satisfied that no decree can be made. I have, therefore, felt bound to consider the question whether there has been such an acquiescence on the part of the plaintiff Thomas John Marker as would have barred his claim if he had been the sole plaintiff; and I am of opinion that there has not. Neither the catalogue of the timber to be sold, nor the handbill issued upon the sale, presuming him to have seen them, contained any further description of the timber than that it was selected from the Gittisham coppices, and his affidavit in reply distinctly states that he did not know the timber advertised was ornamental until the latter end of February last, soon after which time the bill in this suit was filed. It appears, indeed, that although not prohibited from going upon the estate, there had been unfortunate disputes which might naturally prevent him from going there. It is, I think, clearly established by the affidavits, that the timber intended to be felled was (whether purposely or not it is unnecessary for me to consider) so marked as that had he gone upon the estate he could not have detected the marks without

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traversing the woods. It is to be borne in mind, too, in considering the question of acquiescence on the part of the plaintiff Thomas John Marker, that his right depended upon what, under the circumstances of this case, was to be considered as ornamental timber — a question of some difficulty for the court itself to determine. Parties cannot, I think, be said to acquiesce in the claims of others, unless they are fully cognizant of their right to dispute them.

Delay was also urged as an objection to the motion, but the same reasons which apply to the question of acquiescence apply also to the question of delay.

The last objection, independent of the substantial merits of the case, rested upon the ground that the purchasers of the timber were not parties to the suit. But I think this objection rather applies to the question, what security the defendant Henry William Marker is entitled to require from the plaintiffs, if the injunction be granted, than to the question whether the injunction is to be granted or not. For, although purchasers of timber may be entitled, in some cases, to insist upon the delivery of the specific timber contracted for, and to enforce it by suit for specific performance, I apprehend a special case is required for the purpose, and that the ordinary remedy of such purchasers is in damages. The case of *Carlisle v. The South-eastern Railway Company*, cited by Mr. Giffard, does not seem to me to apply. The question in that case, as I recollect it, was upon maintaining an injunction which had been obtained at the instance of some shareholders, suing on behalf of themselves and others, against the payment of dividends by the company; and Lord Cottenham dissolved the injunction as to the dividend actually declared, upon the ground that the declaration of a dividend constituted a separate right in each shareholder; and that the plaintiffs could not, therefore, as to that dividend, sue on behalf of themselves and the others. But the case involved no further question of the right to sue, and there can be no doubt that the plaintiffs in this case have a common interest in the subject matter of the suit.

I have felt myself compelled, therefore, to consider this motion upon the substantial merits of the case, and I think it may well be considered in two points of view: first, whether the plaintiffs are entitled to the injunction upon the ordinary doctrine of the court in cases of equitable waste; and, secondly, whether they are so entitled under the special terms of the particular deed on which their title is founded.

With reference to the first point, I consider the doctrine of the court applicable to cases of equitable waste to be perfectly well settled. The court considers the excessive use of the legal power incident to an estate unimpeachable of waste to be inequitable and unjust, and therefore controls it; but it exercises that control with reference to the presumed will and intention of the party by whom the power was created, and not to any fancied notions of its own; and, therefore, as to ornamental timber, confines its protection to timber planted or left standing for ornament. The question, therefore, in all such cases, is a question of fact, and the main difficulty lies in the evidence necessary to establish the fact.

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With respect to the second point, it is, so far as I am aware, a somewhat new question. The evident intention of the settlement is to preserve the beauty of the place unimpaired; and the deed as evidently refers to the state of the property at the time of its execution, "of which timber it is hereby declared that enough shall always remain to preserve the beauty of the place unimpaired." May it not be considered, then, that the settler has set up a standard of beauty defined by the existing state of the place? And although there will be, no doubt, great difficulty in executing a trust or enforcing an injunction to preserve the property according to that standard, I am not prepared to hold that the difficulty is such that it is beyond the power of the court to grapple with it. Suppose the settler had built a house and had directed money to be applied in furnishing it in the most tasteful manner, or to put a case nearer to the present, in laying out gardens most ornamentally, would not the court have executed the trust? And yet the judgment of the court, in such a case, would have had to be exercised on matters of taste and beauty, and without any standard to guide it. The court, too, is not unfrequently called upon to act upon the opinions of persons of science, and why should it not then act upon the opinions, which are consulted by others under similar circumstances, of persons of taste? It is to be observed, too, that in the present case the restriction upon waste is connected with the trust. It is clear that the tenants for life are not intended to cut what may not be cut by the trustees, and if, therefore, the restriction upon the tenants for life fails, that upon the trustees would seem to fail also; and neither the cases which have been referred to, nor others to which I have referred, seem to me to decide this question. It is true that Lord Eldon, in *The Marquis of Downshire v. Lady Sandys*, used the expression, "the question, which is the most fit method of clothing an estate with timber for the purpose of ornament, cannot be safely trusted to the court;" but he uses that expression with reference, not to a particular trust or a specific restriction, but with reference to the general doctrine in ordinary cases, and his observations in the second branch of the case, when it was brought before him with reference to the provision against injuring the beauty of the mansion-house, rather indicate, I think, his opinion that the provision would be good. It will be observed that that case came twice before the court; first, upon a motion to commit for a breach of the injunction; and afterwards on a motion which had for its object both to dissolve the injunction and discharge the order which was made on the motion for committal. That part of the deed which had reference to the preservation of the beauty of the place was only brought under the consideration of the court on the occasion of the case secondly coming before it, and it arose in this way — that that part of the trusts of the deed had no reference to the prior tenant for life, Lady Sandys. It had reference to a future tenant for life; and upon an injunction being first granted, and a motion for a sequestration made, that part of the deed had not been entered on at all. After that motion had been disposed of, the case was afterwards brought before the court, on the part of Lady Sandys, contending that as the deed contained a

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provision that the beauty of the place should be preserved unimpaired, the original injunction which had been granted was wrong, and Lord Eldon entered into a consideration of that question, but he entered upon it only to this extent, namely, to consider whether that provision which applied to a subsequent tenant for life did or did not alter the rights of the preceding tenant for life, and he held that it did not; but he makes one or two observations upon the provision itself; in page 114 of the report I find him saying, "This at least is clear; that Lady Sandys claiming an estate for life without impeachment of waste, upon the deed in general, must be understood upon the deed to claim that estate with such powers as the law of the land, administered in a court of law, subject to such restraints to which that law is subject as administered in a court of equity, gives her, as to felling timber; and neither party can allege surprise in finding their legal rights affected by those restraints. With respect to the question, whether there is context enough in this deed to authorize me to say, the defendant can do those acts which in general a tenant for life expressly without impeachment of waste is not entitled to do, because some other persons are authorized after her death to cut timber under the particular terms specified in the power of the trustees, I do not know that it is a necessary inference that one party shall have a power to-day, because another party has a power capable of being exercised to-morrow." That, I believe, is the only important observation that occurs in the judgment at all indicating his view that he there takes, clearly making a distinction between the trusts created by a deed and the common case of equitable waste. The cases of indefinite trusts of a charitable nature, to which I was referred, do not seem to me to apply. There is no standard of benevolence, and the objects are too unlimited to create such a standard; and the same observation applies to cases which, perhaps, more nearly resemble the present, where the court has refused to enforce by injunction a covenant not to build, except "so as to be an ornament rather than otherwise to the surrounding property;" or to keep a garden "in a neat and ornamental order," as in *Mann v. Stephens*, and in *Tulk v. Moxhay*. These cases, I think, have rather more application to the present; but I think the same principle which applies to the case of charities, or rather, of benevolent dispositions, applies also to this. You have no standard, you cannot tell what by any possibility will be rather more improvement than otherwise to the adjoining property, nor can you otherwise tell me the meaning of keeping a garden in neat and ornamental order.

These being the views which I entertain of the case, and the question now being, whether I am to permit acts to be done by which they would be wholly frustrated, and the power of the court to deal with them at the hearing of the cause be defeated, I think that it is my duty to some extent to interfere by injunction. I think, however, that no case whatever is made out as to the two hundred oaks not being in the woods; there is nothing whatever to show that any of them were planted or left standing for ornament or shelter; nor is there any evidence that any of them are, in fact, ornamental within

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the provisions of the deed, except as to the eleven oaks above the orchard, and the five on the road from the vicarage, and as to these, I think, the case fails. I am of opinion, therefore, that as to these two hundred trees the injunction ought to be refused. With respect to the five hundred oaks in the woods, however, I think the case widely different. These woods are in immediate proximity to the mansion-house. The settler, in the deed, refers to timber ornamental to the mansion-house and pleasure grounds, and the views and prospects of the same. And there does not appear to be any evidence of there being any timber upon the estate which could fall within that description, other than the timber in these woods. The settler lived for nearly two years after the execution of the settlement, and never cut any timber in these woods, although it is clear that they were crowded with timber, and her estate was unimpeachable of waste, except as to ornamental timber.

These considerations far outweigh, in my mind, the evidence on the part of the defendant Henry William Marker. I cannot place much reliance on such of the affidavits on his part as state simply the fact that the woods were not planted or left standing for ornament or shelter, without assigning any reason for that conclusion; or much more reliance on such of the affidavits on his part as ground the conclusion on the existence of stools or stumps, without information as to the circumstances under which those trees were cut down. Nor can I rely on the case of the tenants for life whose estates were impeachable of waste, or on the statement that the settler intended to cut down timber in those woods, no such act having been done by her, and the statement having been made after the execution of the deed by which the property had become bound by the trust.

I should have felt it right, therefore, to interfere as to these five hundred oaks even if the question had rested simply upon the point whether they were left standing for shelter or ornament; but beyond this I think it clear upon the evidence that they are, in fact, ornamental within the meaning of the deed, and I am perfectly satisfied upon the evidence that they cannot be cut down without impairing the beauty of the place. I am of opinion, therefore, the injunction must go as to the five hundred oaks, and I think it would be proper to extend it to other timber in the same woods, but no further.

It must be borne in mind, however, that possibly the plaintiffs' case may not ultimately be established; and I must require the plaintiff, Thomas John Marker, therefore, to give security, as in *Wombwell v. Bellasyse*; and upon the same principle I think the security must be extended to any loss or damage the defendant Henry William Marker may incur or sustain by reason of his being prevented from completing the sale of the five hundred oaks or any of them. And if the defendant Henry William Marker desire it, I will add a reference to the master to inquire whether any and which of the five hundred oak-trees, or any and what other trees, standing and growing in the three woods, can be cut without impairing the beauty of the place as it stood at the time of the execution of the settlement of the 11th of October, 1844. I offer that inquiry with this view, that the report

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upon the inquiry might come on with the cause at the hearing of it, and then if the court shall be of opinion that under the very particular terms of this trust the true result is, that the timber is to be protected to the extent merely of preserving enough of ornamental timber to keep up the beauty of the place, then the court would be at once in a position to relieve the parties from the difficulty of an injunction by declaring what trees might be cut down. It is for the defendant to consider whether he desires to have that inquiry or not. I offer it on the present occasion with the view I have stated.

In order that we may not have discussions on minutes, I am anxious to get the order which is to be drawn up perfectly understood. I refuse the injunction as to the two hundred trees, and I grant the injunction as to the five hundred trees, and any other trees standing in these woods, following the terms of the order in *Wombwell v. Belasyse* as to the security, and adding to those terms the words which I have mentioned, "of any loss or damage which the defendant Henry William Marker may incur or sustain by reason of his being prevented from completing the sale of the five hundred oaks or any of them." And if the defendant Henry William Marker desires it, I will add a reference to the master to inquire whether any and which of the five hundred oak-trees, or any and what other trees standing and growing in the three woods, can be cut without impairing the beauty of the place as it stood at the time of the execution of the settlement of the 11th of October, 1844.

*In re SMYTH'S SETTLEMENT.*¹

May 3, 1851.

Trustee Act, 13 & 14 Vict. c. 60 — New Trustees — Transfer of Stock.

New trustees of stock appointed under the 13 & 14 Vict. c. 60, have not the right, under the act, to a transfer of the stock directly to them; but the right only to call for a transfer from the old trustees, or, if they should be incapable or refuse to make such transfer, to exercise the powers of the act which provides for such cases.

THE sum of 12,169*l.* 17*s.* 2*d.*, 3*l.* per cent. consols, stood in the names of John Weyland, John Ballard, Sir John Tyrrell, and Mr. Strutt, upon the trusts of the marriage settlement of the late Sir E. B. Smyth.

Sir John Tyrrell and Mr. Strutt died, Mr. Weyland became desirous of being discharged, and Mr. Ballard was incapable of acting.

A petition was presented under the 13 & 14 Vict. c. 60, praying for the appointment of new trustees; and, by an order made thereon, it was ordered that Sir C. W. C. de Crespigny, the Rev. A. J. E. B.

¹ 20 Law J. Rep. (n. s.) Chanc. 255.

Ridgway v. Ridgway.

Smyth, G. W. J. Gyll, and B. B. H. Rodwell should be appointed new trustees, and that the right to the said 12,169*l.* 17*s.* 2*d.*, 3*l.* per cent. consolidated bank annuities, should vest in Sir C. W. C. de Crespigny, A. J. E. B. Smyth, G. W. J. Gill, and B. B. H. Rodwell, and that the right to the said stock so vested in Sir C. W. C. de Crespigny, A. J. E. B. Smyth, G. W. J. Gill, and B. B. H. Rodwell, under the provisions of the said Trustee Act, should be exercised by them in obtaining a transfer into their own names of the stock, to be by them held upon the trusts of the said marriage settlement of, &c., or such of them as were then subsisting or capable of taking effect.¹

The Bank of England having declined to act under this order, the case was now mentioned to the court.

By the 13 & 14 Vict. c. 60, s. 35, it is enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, *to vest the right to call for a transfer of any stock* subject to the trust, in the person or persons who, upon the appointment, shall be the trustee or trustees.

Mr. Headlam, for the petition.

Mr. Wigram, for the Bank of England.

KNIGHT BRUCE, V. C. In my opinion an order under the 35th section amounts only to a declaration by the court that the new trustees are the proper persons to have the stock transferred to them. If these persons shall be unable, or shall refuse to make the transfer, recourse must be had to the other provisions in the act of Parliament applicable to those events. The order before made must now be discharged, so far as it directs that the right to the stock which vested in the new trustees should be exercised by them in obtaining a transfer of the stock; and, in lieu of this direction, I shall declare that the right to call for a transfer of the stock shall be vested in the new trustees.

RIDGWAY v. RIDGWAY.²

March 23, 1851.

Will — Construction — Vesting.

A testator bequeathed his residuary personal estate to trustees, upon trust for A for life, and after the death of A the said trust money and income in trust for all and every the children of A, share and share alike, to the son or sons when they should have attained the age of twenty-one, and for the daughter or daughters at that age or marriage; with a gift over, if A should die without having a child, or, having any, such children should die, being sons before twenty-one, and daughters before twenty-one or marriage. A died leaving an only child B, who died under twenty-one:—

¹ The order is set out at length in *Re Smyth's Settlement*, 2 De Gex & Sm. 771.

² 20 Law J. Rep. (N. S.) Chanc. 256.

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Held, that the trust property had vested in B, so that the income between the death of A and the death of B belonged to B's estate.

WILLIAM PRESTON, by his will, dated the 23d of January, 1815, gave his residuary personal estate to trustees, upon trust to pay the income to his wife, Elizabeth Preston, for her life. The directions as to the application of the property after her death were as follows: "Then the whole of the interest, dividends, and produce shall be paid to and for the use of my said daughter, Mary Preston, and her assigns, during her natural life, and, from and after the decease of my said daughter, then the said trust money, and the interest, dividends, and produce thereof, in trust for all and every the children and child of my said daughter, born in wedlock, equally amongst them, share and share alike; to the son or sons, when they shall have attained the age of twenty-one years, and for the daughter or daughters at that age or marriage, my said wife being also dead. And I declare that, in case my said daughter Mary Preston shall happen to die without having any child or children, or, having any, all such children shall happen to die before they shall attain the age of twenty-one years, being a son or sons, and, being a daughter or daughters, shall die before they shall attain that age or marry, then and in such case the said trustees and the survivor, his executors, administrators, and assigns, shall stand and remain possessed of and interested in the said trust money, and the interest, dividends, and annual produce thereof," &c. The testator then declared certain trusts therein contained.

William Preston died in 1815. Elizabeth Preston died in February, 1835. Mary Preston married Mr. Matthews in 1829, and died in February, 1835, leaving Mary Matthews, her only child, her surviving. Mary Matthews, the daughter, died in 1847, at the age of sixteen years, without having been married.

In a suit for the administration of the estate of William Preston, a question arose as to whom the income of the residuary estate, between the death of Mary Matthews the mother and Mary Matthews the daughter, belonged to; or, in other words, whether the residuary estate of the testator had vested in Mary Matthews, the daughter, under the will, subject to being divested, or whether it was given to her contingently on her attaining twenty-one years.

Mr. Russell and Mr. Giffard, for the plaintiffs.

Mr. Lloyd and Mr. Hale, Mr. Malins and Mr. Chandless, Mr. Kenyon and Mr. Amphlett, for the other parties.

The following cases were cited: *Leake v. Robinson*, 2 Mer. 363. *Saunders v. Vautier*, Cr. & Ph. 240; s. c. 10 Law J. Rep. (N. S.) Chanc. 354. *In re Bartholomew's Trust*, 1 Hall & Twells, 565; s. c. 1 Mac. & Gor. 354; 19 Law J. Rep. (N. S.) Chanc. 237.

KNIGHT BRUCE, V. C., held, that the share had vested in Mary Matthews the daughter, and, consequently, that the intermediate income belonged to her.

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PRICE v. LOVETT.¹

March 17, 1851.

Officer in the Army — Assignment of Pay.

An officer in the army may assign for the benefit of his creditors the difference received by him upon going on half pay.

THE bill stated that the defendant, George William Molyneux Lovett, who was, in 1848, a captain in her majesty's service, and had now retired on half pay, was indebted to the plaintiff in the sum of 455*l.* 15*s.* 4*d.*; that the plaintiff recovered a judgment against the defendant to secure the payment of the said sum with interest thereon; that the plaintiff was also indebted in various sums to several other persons, and on the 15th of January, 1850, a deed of arrangement was executed by the said defendant and the plaintiff, whereby the said G. W. M. Lovett assigned to the plaintiff and another person as trustees of the deed a portion of his pay, so long as he should continue upon full pay, to be received by them at the rate of 8*l.* 8*s.* per month, upon trust to liquidate the debts due to his creditors until the whole amount so due should have been fully paid and satisfied; and the said indenture contained a covenant, on the part of the trustees and such creditors as should sign the same, that until default should be made by the said G. W. M. Lovett in payment of the said monthly sum of 8*l.* 8*s.*, they the said creditors would not sue, arrest, imprison, or attach the said G. W. M. Lovett or any of his property on account of any sum of money due to them; and in case the said creditors should act contrary to the last-mentioned covenant, the said G. W. M. Lovett should be acquitted from any debts due by him to such creditors; and the said deed also contained a covenant, on the part of the said G. W. M. Lovett, that in case he should at any time, before the whole of his said debts were paid and satisfied, sell his commission in the army, or exchange his regiment, or retire on half pay, then, and in any and every such case, all moneys that should be payable to the said G. W. M. Lovett for or on account of any such sale, exchange, or retirement, should from time to time be received by the said trustees of the said deed, and applied towards the payment of the respective debts of the said persons who should sign the said deed of arrangement, and the surplus was to be paid over to the said G. W. M. Lovett. The bill then stated that none of the creditors of the said G. W. M. Lovett had ever signed the said deed except the plaintiff; that in the month of December, 1850, the plaintiff had discovered that the defendant had obtained leave to retire from the army on half pay, and that thereupon the sum of 511*l.* had become payable to him, and that the same was now in the hands of Messrs. Downes, the agents for his regiment, and that such sum, subject to the deduction of 105*l.*, the amount of the regimental debts of

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the defendant, was now payable to the plaintiff under the said indenture of the 15th of January, 1850; that upon application by the plaintiff to have such sum paid to him, he had been informed that the defendant refused to give his authority for the plaintiff to receive it, considering that such sum ought to be paid equally amongst all his creditors; that on the 8th of January last, the plaintiff had made an affidavit of his said debt in the court of the Lord Mayor of London, and caused a writ of attachment against the said G. W. M. Lovett to be issued out of the said court. The bill prayed that it might be declared that the said sum of 511*l.*, subject to such regimental debts as aforesaid, was bound by and liable to the trusts of the said indenture of arrangement, and that the same ought to be paid to the plaintiff upon such trusts; and it prayed an injunction to restrain the army agents, in whose hands the money still remained and who were made parties to the bill, from paying the said sum to the defendant, G. W. M. Lovett.

An injunction in the terms of the prayer having been obtained, —

Mr. Roll and *Mr. Glasse* now moved to dissolve the injunction, and contended that the indenture of the 15th of January, 1850, was contrary to public policy. That there were various authorities showing that an officer in the army could not assign his pay or any portion of it by way of security to his creditors. That the money received by an officer as the difference upon his retiring on half pay ought to come within the same principle. That even if the defendant had a right to assign the money paid on such retirement, still the previous clause assigning his pay being invalid, the rest of the deed must also fail. That, at any rate, the plaintiff had forfeited his right to have the trusts of the deed carried into effect, because he had acted contrary to the express terms of the deed by issuing out an attachment against the plaintiff, although no default had been made in payment of the 8*l.* 8*s.* per month so agreed to be paid. *M^r Carthy v. Gould*, 1 Ball & B. 389.

Mr. Bethell and *Mr. Welford* appeared for the defendant, G. W. M. Lovett, and

Mr. Bowles, for the army agents.

LORD CRANWORTH, V. C. The defendant in this case, Captain Lovett, in order to secure his debts, assigned to a particular creditor, the plaintiff, a portion of his pay while he was on full pay, to be received by him at the rate of 8*l.* 8*s.* per month, and to be held by him on trust to liquidate his debts. The deed contained also a stipulation that if before default should be made in payment of the 8*l.* 8*s.* per month, the creditors should attach the goods of Captain Lovett, to satisfy their debts by obtaining any property extra the 8*l.* 8*s.* per month, then that all benefit under the deed should be forfeited by those who should have signed the deed. There is also a covenant that if Captain Lovett should retire from full pay and go upon half pay and

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receive any sum of money by way of difference, then the trustees were to receive such sum, which was also to go in liquidation of his debts. Now, it seems that Price, the plaintiff, was the only creditor who executed the deed, and it was, therefore, only a trust for his benefit. In December last, the defendant retired upon half pay, and it turned out that a sum of 511*l.* would be coming to the defendant as the regulation difference, subject to the payment of certain regimental expenses. Now, according to the express terms of the deed, there was a sum of 511*l.* for the creditors to be applied on the trusts of the deed. I will assume that the monthly instalments of 8*l.* 8*s.* were regularly paid, and then Mr. Price discovered in the January following that the defendant was about to dispute his right to receive the 511*l.* It does not appear that Captain Lovett had any dishonorable intention in what he thought right to do; he, in fact, considered that the money ought to be divided equally between his creditors, and that it was unjust for it all to go to the plaintiff to the exclusion of others. In this state of things Price took steps to attach the money to prevent its getting into the hands of Lovett; he filed a bill and obtained an injunction, and one question is whether he was warranted in doing so. I think he was. It has been argued, first, that the deed was contrary to public policy, and ought to be declared void, on the ground that it was an assignment of pay, and also of difference received upon going on half pay. Now, the question as to the assignment of a portion of the full pay while he was in the army has come to an end by his retiring on half pay. The principle upon which it is not permitted to assign half pay is, that an officer may be able to maintain himself and be in a position to come back to the army whenever it may please her majesty to require his services. I do not suppose this power is ever exercised now; but it is clear that her majesty has the power to claim the services of any person on half pay. The only question, therefore, is, as to the assignment of the difference in going upon half pay; but I do not see any ground for applying the same principle to such a sum of money which is paid in a gross amount upon retirement, and may be at once spent or given in charity or disposed of in any way. The crown trusts to the half pay being sufficient for the maintenance of an officer in such a position as that he may be brought back to the army at any subsequent period. It appears to me, that the doctrine of not allowing the assignment of pay or half pay does not apply to a gross sum received by way of difference.

Then, it was contended that inasmuch as this deed contained an assignment of pay which was invalid, consequently the whole of the deed was void: but that is quite wrong. There is no reason why, because there may be a stipulation in a deed which is contrary to public policy, that therefore the rest of the deed should not be carried out. This disposes of that question, about the power to assign.

Then, it is contended, it being assumed that there was no default in payment of the 8*l.* 8*s.* per month up to January, that it was therefore an improper act on the part of the plaintiff to cause a writ of attachment to be issued out of the Lord Mayor's Court against the defendant, and that Price had therefore forfeited the benefit of the

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deed. It appears to me that does not apply. I think there was no objection against Mr. Price, when he found the money likely to be taken from him, issuing an attachment to obtain the benefit for himself.

I think, therefore, that the motion must be refused, with costs.

BROWN v. THE MONMOUTHSHIRE RAILWAY AND CANAL COMPANY.¹

January 14, and February 6, 1851.

Demurrer — Jurisdiction.

By their acts of Parliament, the Monmouthshire Railway and Canal Company were empowered to make a new railway, with branches, and to improve their existing railways, and to adapt them to the use of locomotive engines, which the company were required to provide, and a time was limited for the completion of the works. The works were not completed in pursuance of the requisitions of the act of Parliament, in consequence, as was alleged, of want of funds:—

Held, under the circumstances, that the court had not jurisdiction, at the suit of a shareholder, to restrain the company from declaring a dividend until the works were all completed, there being no provision in the acts to that effect.

THE bill in this suit was filed in November, 1850, by James Brown, on behalf of himself and all other the shareholders of the Monmouthshire Railway and Canal Company, against the company and certain persons who formed the committee of management of the company; and it prayed that the defendants might be restrained from declaring or making any dividend to any of the shareholders of the company at the ensuing meeting of the 20th of November, 1850, and from at any time declaring or making any dividend to any of the shareholders of the company, until they should have completed the railway and branches by the Newport and Pontypool Railway Act, 1845, authorized to be made; and until they should have improved their then existing railways, and adapted them for the convenient passage of locomotive steam engines, for the carriage of goods and merchandise at reasonable rates of speed; and until they should have provided carriages and locomotive steam engines, and other moving power necessary for the carriage of passengers, animals, and goods which might be conveyed to their railway, and which they might be required to carry thereon; and until they had provided such carriages, locomotive steam engines, and other moving power as aforesaid, for the accommodation and convenience of the public; and until all necessary facilities should be afforded by the company, as well for conveying passengers, animals, and goods along their railways, as for taking passengers, animals, and goods to and from the same.

By an act of Parliament passed in the year 1792, intituled "An Act for making and maintaining a navigable cut or canal from, or

¹ 15 Jur. 475.

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from some place near Pontnewynydd into the River Usk, at or near the town of Newport, and a collateral cut or canal from the same at or near a place called Crynder Farm, to or near to Crumlin Bridge, all in the county of Monmouth; and for making and maintaining railways or tramroads from such cuts or canals to several iron works and mines in the counties of Monmouth and Brecknock; "the several persons therein named or referred to were united into a company, and incorporated by the name of "The Company of Proprietors of the Monmouthshire Canal Navigation," for the purpose of carrying on, making, completing, and maintaining the cuts and canals therein mentioned, for the passage of boats, barges, and other vessels, and also the railways or tramroads therein mentioned, for the passage of wagons and other carriages, according to the rules, orders, and directions hereinafter mentioned; and for the purposes of the undertaking, the company were authorized to raise capital by shares and subscription, or mortgage; and it was provided that a committee of thirteen persons, to manage the affairs of the company, should be chosen by the shareholders in the manner therein mentioned.

Another act was passed in 1797, for extending the Monmouthshire canal and navigation, and for explaining and amending the act of 1792, and authorizing the company to raise further capital to complete their works. Another act was passed in 1802, authorizing the company to make and maintain certain railways to communicate with the canal navigation, and to raise a further sum to complete their undertaking, and also explaining and amending the acts of 1792 and 1797.

By an act passed in 1845, intituled "An Act to authorize the Company of Proprietors of the Monmouthshire Canal Navigation to make a railway from Newport to Pontypool, and to enlarge the powers of the several acts relating to the company," after reciting, amongst other things, that the making of a railway from Newport to Pontypool, with the branches therefrom, which were hereinafter mentioned, would be of great public advantage, and the company were willing to make and maintain the same if empowered so to do, and that it would also be of great public advantage if the company were empowered to improve the existing railways, and to become carriers of passengers, animals, and goods along their canals and railways, powers were given to the company to make a railway from Newport to Pontypool, with branches, and also to improve their existing railways, and to become such carriers as aforesaid; and it was enacted, that the railway and branches thereby authorized to be made, and which were in the act and are hereinafter designated by the expression "the railway," should be completed within three years from the passing of the act, and at the expiration of such period the powers granted to the company for making the railway, or otherwise in relation thereto, should cease to be exercised, except as to so much of the railways as should then be completed; and after reciting that the company had agreed to improve their existing railways, so as to adapt them for the passage of locomotive steam engines, and also to become carriers on such railways, as well as the railway, in order

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thereby to afford increased facilities to trade, and promote the public convenience, it was further enacted, that the company should, and they were thereby required, within three years after the passing of the now stating act, to improve their existing railways, wherever that might be necessary, to adapt them for the convenient passage of locomotive steam engines, for the carriage of goods and merchandise at reasonable rates of speed, and to provide and maintain such and so many carriages and locomotive steam engines, and other moving power, as might be necessary for the carriage of passengers, animals, and goods, which might be conveyed to their railways, and which they might be required to carry thereon; and such carriages and locomotive steam engines, and other moving power as might be required, should be provided and furnished by the company at reasonable times, for the accommodation and convenience of the public, and all necessary facilities should be afforded by the company, as well for carrying passengers, animals, and goods along their railways, as for taking passengers, animals, and goods to and from the same; and that it should be lawful for the company to make and provide stations, &c.; and the company was also authorized to take and make certain tolls and charges, in respect of the railway and works thereby authorized to be made, very much smaller in amount than those which, under their said former acts of Parliament, they were authorized to take and make in respect of their said then existing canals and railways.

And it was further enacted, that, at the expiration of three years after the passing of the act, no higher tolls should be taken on the existing canals or railways of the company than should for the time being be payable for the like articles conveyed, under the like circumstances, on the railway thereby authorized to be made, or would be payable thereon, if then open for traffic, and the tolls thereby imposed on the railway might thenceforth be demanded and received on the existing canals and railways of the company, and on all other railways made under the powers of the recited acts, or any of them, and all and every the provisions and enactments therein contained for regulating the tolls payable on the railway, should apply to the tolls thenceforth payable on the existing canals and railways of the company, and on such other railways; and that all enactments contained in any of the recited acts, which provided that railways made under the powers thereof should be public, on payment of the like tolls which for the time being should be payable to the company, should be and the same were thereby extended to the tolls thereby authorized to be taken by the company, and no higher tolls than should for the time being be taken under the powers therein contained should thereafter be demanded or received for the use of such other railways, save when therein otherwise expressly provided.

And it was further enacted, that the company should, and they were thereby required to carry, as common carriers for hire, on their existing railways, within three years after the passing of that act, and also on the railway, when and so soon as the same should be open for traffic, by means of locomotive steam engines or other moving power,

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in their own carriages, and in the carriages of other persons, all passengers, animals, and goods which might be brought to their railways, and which they might be required to convey thereon; and that the company should afford to all persons conveying or sending goods upon their railways every reasonable conveyance and facility for loading and unloading goods upon and from the carriages, whether their own or those of the company, at the several stations, or other places for delivering or receiving such goods, without giving any preference or priority to one person over another in the time or manner of loading, unloading, receiving, conveying, or delivering such goods; and the provisions of the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, were incorporated into the act, as therein mentioned. And it was enacted, that full and accurate accounts should be kept of all the moneys of the company received and expended by the committee and all other persons, and of the matters and things for which such moneys should have been received or expended. And it was enacted, that the books of the company should be balanced fourteen days at the least before each ordinary meeting, and forthwith, on the books being so balanced, an exact balance sheet should be made up, which should exhibit a true statement of the capital stock, credits, and property of every description belonging to the company, and the debts due by the company at the date of making such balance sheet, and a distinct view of the profit or loss which should have arisen on the transactions of the company in the course of the preceding half year; and previously to each ordinary meeting, such balance sheet should be examined by the committee, or any three of their number, and should be signed by the chairman; and that previously to every ordinary meeting at which a dividend was intended to be declared, the committee should cause a scheme to be prepared showing the profits, if any, of the company since the preceding ordinary meeting at which a dividend was declared, and apportioning the same, or so much thereof as they might consider applicable to the purposes of a dividend, among the shareholders, and should exhibit such scheme at such ordinary meeting, and at such meeting a dividend might be declared. And it was enacted, that the company should not make any dividend whereby their capital stock would be reduced; and that before apportioning the profits to be divided among the shareholders, the committee might set aside thereout such sum as they might think proper to meet contingencies, or for enlarging, repairing, or improving the works connected with the undertaking, or any part thereof, and might divide the balance only among the shareholders. Another act was passed in 1848, whereby the name of the company was changed to that of "The Monmouthshire Railway and Canal Company;" and after reciting that it was expedient that the company should have the exclusive control over their railways and tramroads, it was enacted, that from and after the 1st of August, 1849, no horse, &c., whether drawing or not, should go, travel, or be driven upon any railway or tramroad of the company, except as therein mentioned, nor should any locomotive power be used thereon, except as provided by the company; and they were thereby required to supply proper

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engines for the convenience of the traffic, and they were empowered to raise further capital for completing their works; and the time for the compulsory purchase of lands was enlarged for two years from the passing of the act, i. e., to the 14th of August, 1850, and also the time for adapting the existing railways for the use of locomotive engines, till the 1st of August, 1849; and the time for completing the Newport and Pontypool Railway was enlarged for two years from the passing of the act. The company were also authorized to take higher tolls than those authorized by the act of 1845, till the year 1858, but with a proviso, that during the continuance of such increased tolls, they should not make any higher dividend than 5*l.* per cent. per annum. The bill stated the above acts, and alleged that the company had during the last two years neglected to complete the Newport and Pontypool Railway within the said extended term of two years, and had discontinued all the works for the construction thereof, and had not taken, and refused to take, any steps for resuming their operations thereon, and that no part of the Newport and Pontypool Railway was completed or opened for the conveyance of passengers and goods: that they had not improved, or adapted to the use of locomotive engines, one of their existing railways, called "The Blaenavon Railway;" that they had partially improved their other existing railways, and opened on parts thereof locomotive traffic for goods only, but had not opened any part thereof for passenger traffic: that the company had full power to complete the railway from Newport to Pontypool, to improve their existing railways, and to adapt the same for the convenient passage of locomotive steam engines, for the carriage of goods and merchandise at reasonable rates of speed, and to provide and maintain such locomotive steam engines and other moving power and carriages as they, by their acts, were required to provide and maintain; and that they had not alleged, and did not allege, any reason for not completing the railway from Newport to Pontypool, or for not improving their said existing railways, and adapting them as aforesaid, or for not providing such locomotive steam engines, &c., as aforesaid, except the want of funds; but they had alleged, and did allege, their want of funds, and their inability to raise money for the purpose, as the reason for their neglect to comply with the exigencies of the acts of Parliament: that according to the accounts of the company, made up to the 31st of March, 1850, the total sum required for the several purposes aforesaid was 116,474*l.* 16*s.* 8*d.*, while, since the passing of the Newport and Pontypool Railway Act of 1845, the company had paid, in dividends and income tax, sums amounting to 108,942*l.* 11*s.* 7*d.*, the whole of which would have been applicable to the making of their works: that the managing committee intended to declare and make, and unless restrained by injunction would declare and make, at the next ensuing general meeting, out of the funds of the company in their hands, a dividend to the shareholders. And the bill charged that they had no funds, and no prospect of obtaining funds, available for the said works and improvements which they ought to make under the said acts of 1845 and 1848, or for furnishing locomotive steam engines, &c., except the funds out of which they were

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about to declare and make such dividend as aforesaid, and the whole of their funds and income, not only for the present, but for several years to come, would be required for the making of such works and improvements, &c.; and that until the company had complied with the requisitions of the said act, and until they had made such works, &c., it was not a legal or proper application of the moneys of the company to make dividends thereout; and that the obligation to make such works, &c., according to the exigency of the said acts, was an existing liability of the company, and that there were no moneys of the company properly applicable as dividends until such existing liability was discharged or provided for. To this bill the defendants demurred for want of equity and want of parties.

R. Palmer and Campbell, for the demurrer, contended that there was nothing in the acts of Parliament to prevent a dividend being declared, although the works were not completed. The income actually derived from the earnings of the canal and railways in operation was not applicable for the making of the works, and unless the shareholders chose to apply it for that purpose, the court had no jurisdiction to compel such appropriation. It was a matter of internal management whether a dividend should be declared or not, and the court had no jurisdiction, at the instance of an individual shareholder, to prevent it. If the company, or committee of management, were about to do an illegal act, or an act prohibited by the legislature, the court might interfere, but that was not the present case. The question was not one between the public and the company, arising out of the non-performance of their contract by the company, but between shareholders.

Turner and W. M. James, for the bill, contended that any shareholder was entitled to restrain the declaration and payment of a dividend as long as there were liabilities of the company unprovided for. This was a principle common to all partnerships, whether of a private or public character. The making of the works, &c., authorized by the acts of 1845 and 1848, was a liability attaching to the company, and which they were bound to perform. They took the tolls authorized by those acts, and they refused to perform the condition annexed to them, which was a state of things the court would not sanction. The liability to perform their contract was a debt in equity, which ought to be discharged before the income could be applied in paying a dividend, for the income was, under the acts, only applicable for that purpose after providing for all debts.

The following cases were also cited: *Salomons v. Laing*, 14 Jur. 279, 471. *Cohen v. Wilkinson*, 13 Jur. 641. *Colman v. The Eastern Counties Railway Company*, 10 Beav. 1. *Mozley v. Alston*, 1 Ph. 800. *Foss v. Harbottle*, 2 Hare, 461.

February 8, 1851. LORD LANGDALE, M. R. This case came on to be argued on a demurrer to a bill filed by James Brown, on behalf of himself and all other the shareholders of the Monmouthshire

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Railway and Canal Company, against the company and certain persons named and stated to be the committee of management of the said company, and praying that the company may be restrained by the injunction of this court from declaring or making any dividend to any of the shareholders until they shall have completed the railway and branches by their act of Parliament authorized to be made, and until they shall have improved their existing railways, and adapted them for the convenient passage of locomotive steam engines and other moving power necessary for the carriage of passengers, animals, and goods which may be conveyed to the railway, and which they may be required to carry thereon; and until they shall have provided such carriages, locomotive steam engines, and other moving power, as aforesaid, for the accommodation and convenience of the public; and until all necessary facilities shall be afforded by the company, as well for conveying passengers, animals, and goods along their railways, as for taking passengers, animals, and goods to and from the same.

The case made by the bill, so far as it seems to me necessary to state it on this occasion, is, that by an act of Parliament passed in the year 1792, the company of proprietors of the Monmouthshire Canal Navigation was incorporated, and empowered, in the manner therein mentioned, to make certain canals, and rail and wagon ways and roads; that by another act of Parliament, made in the year 1797, the Monmouthshire Canal Navigation was extended, and the former act explained and amended; and that by another act of Parliament, made in the year 1802, the proprietors of the Monmouthshire Canal Navigation were empowered to make certain railways to communicate with the Monmouthshire Canal Navigation, and to raise money to complete their undertaking, and the former acts were explained and amended.

On the 31st of July, 1845, an act, intituled "An Act to authorize the Company of Proprietors of the Monmouthshire Canal Navigation to make a railway from Newport to Pontypool, and to enlarge the powers of the several acts relating to the said company," received the royal assent, and thereby it was recited that the company had made and maintained the canal in the first act mentioned, and the extension thereof in the second act mentioned, and the railroads or tramroads in the first and third acts mentioned; and that the making of a railroad from Newport to Pontypool, with the branches therefrom, which were thereafter mentioned, would be of great public advantage, and the company were willing to make and maintain the same, if they were empowered so to do; and that it would be also a great public advantage if the company were empowered to improve their existing railways, and to become carriers of passengers, animals, and goods along their canals and railways: and it was enacted, that the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, should, subject as therein mentioned, be incorporated with that act, and that the powers contained in the former acts relating to the company should extend to and operate with that act: and by the same act, after empowering the

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company to raise 119,000*l.* in shares, and to make and enforce the payment of calls, and to borrow 120,000*l.* on mortgage or bonds, and for the transaction of business by a committee, and for keeping accounts, and exhibiting balance sheets, and preparing a scheme showing the profits, if any, and apportioning the same, or so much thereof as the committee might consider applicable to the purposes of a dividend, and making various other regulations to be observed by the company, power was given to make the railway, consisting of the main line and branches therein particularly mentioned and described; and it was enacted, that the powers of the company for the compulsory purchase of lands should not be exercised after the expiration of three years from the passing of the act, that is, after the 31st of July, 1848, and that the railway should be completed within three years from the passing of the act, that is, before the 31st of July, 1848; and on the expiration of such period the powers granted to the company for making the railway, or otherwise in relation thereto, should cease to be exercised, except as to so much as should then be completed. The company were then authorized to demand such tolls as therein mentioned for the use of the railway; and it was enacted, that they should, and they were thereby required, within three years after the passing of the act, to improve their existing railways wherever that might be necessary, to adapt them for the convenient passage of locomotive steam engines, for the carriage of goods and merchandise at reasonable rates of speed, and to provide and maintain such and so many carriages and locomotive steam engines, and other moving power, as might be necessary for the carriage of passengers, animals, and goods which might be conveyed to their railways, and which they might be required to carry thereon; and it was enacted, that the company should, and they were required to carry, as common carriers for hire, on their existing railways, within three years of the passing of the act, and also on the railway thereby authorized to be made, when and so soon as the same should be opened for traffic, by means of locomotive steam engines and other moving power, in their own carriages, and in the carriages of other persons, all passengers, animals, and goods which might be brought to their railway, and which they might be required to convey thereon. It appears, then, that by the provisions of this act, at the end of three years from the passing of the act the compulsory power to purchase land was to cease, the railway was to be completed, and the company were to carry, as common carriers for hire, upon their existing railways, passengers, animals, and goods.

In the year 1848, an act of Parliament was passed, whereby the name of the company was changed; and it was enacted, that the company, instead of being called "The Company of Proprietors of the Monmouthshire Canal Navigation," should be called "The Monmouthshire Railway and Canal Company;" and it was thereby enacted, that the powers of the company for the compulsory purchase of lands might, as to certain scheduled lands, be exercised for the term of two years from the passing of that act, that is, until the 14th of August, 1850; and that the term by the former act limited for the

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improvement of the existing railways of the company, when necessary to adapt them for the convenient passage of locomotive steam engines, at reasonable rates of speed, should be extended until the 1st of August, 1849; and that the term limited for the completion of the Newport and Pontypool Railway, and of the works by the recited acts authorized and required, should be extended and enlarged for the term of two years from the passing of the act; and that the powers granted by the act for these purposes respectively might be exercised during such extended periods.

Under this act, which received the royal assent on the 14th of August, 1848, it was the duty of the company, on or before the 14th of August, 1849, to improve their existing railways wherever it might be necessary to adapt them for the convenient passage of locomotive steam engines, at reasonable rates of speed; and they ought, on or before the 14th of August, 1850, to have completed the Newport and Pontypool Railway, and the works authorized and required by the former act. This bill of complaint, which was filed on the 9th of November last, alleges that the company have neglected to complete the Newport and Pontypool Railway; that they discontinued all their works for the construction thereof, and refused to take any steps for resuming their operations thereon, and that no part thereof was, at the expiration of the extended period of two years, or is now, completed or opened for the conveyance of passengers or goods; that a part of the railways of the company existing at the time when the last act passed, viz., the Blaenavon Railway, which it was necessary to improve, in order to adapt it for the convenient passage of locomotive steam engines, for the carriage of goods and merchandise at reasonable rates of speed, was not, at the expiration of the extended period, namely, on the 14th of August, 1849, and has not yet been improved and adapted, but still remains and is unfit for such convenient passage of locomotive steam engines; that no carriages or locomotive steam engines or other motive power has been provided, nor have any other measures been adopted by the company for the carriage of passengers, animals, or goods thereon; that the company never have discharged, and do not discharge, the office of common carriers on the Blaenavon Railway. If these allegations be true — and upon this occasion they must be taken to be so — it is plain that the company have not obeyed the act of Parliament, have not performed the duty in consideration of which the powers which were conferred upon them were given, and they are plainly in default. The bill alleges that the company possess the necessary powers to complete their works, and that they assign no reason, except their want of funds, for not doing what is required; but they allege their want of funds, and their inability to raise money for the purpose, as the reason for their neglect to comply with the exigencies of their acts of Parliament in respect of the several matters complained of. It is alleged that, in this state of things, they have received a considerable income from the employment of their canal and some parts of their roads; and that instead of applying such income, as part of their property, in completing their works, according to their engagement, and in performance of their duty

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under their acts of Parliament, they have (notwithstanding the liability under which their default has placed them) considered, and claim to be entitled to consider, so much of their income as they think proper as profit; and that they have accordingly divided, and claim to be entitled to divide, the same as profit amongst the shareholders. As to the past dividends, it has been alleged, that since 1845 they have gone on making dividends, not anticipating any difficulty in raising capital; but, the difficulty having occurred, they are nevertheless proceeding to declare a dividend; and it being alleged that they have no funds, and no prospect of obtaining funds, available for the works and improvements which it is their duty to make, except the fund out of which they are about to declare a dividend, and that their obligation to make such works and improvements is an existing liability, which ought to be discharged before any profits are declared or divided, this bill is filed for an injunction to restrain them from doing so. The defendants have demurred for want of equity, and the real question upon which the decision of the court is required appears to me to be very properly raised on such a demurrer. Certain formal and technical causes of demurrer are also stated. As the facts and circumstances of this case do not, in my opinion, require me to decide on those formal and technical objections, I may be allowed to observe, without any direct reference to this particular case, that although such demurrers are quite proper to be filed in cases where they are required, to secure due attention to all interests involved in the decision, yet that merely formal and technical causes of demurrer seem to me to be too commonly assigned in cases affecting railway companies and joint-stock companies, on the apparent ground, that if they do no good, they are not likely to do much harm, and may possibly increase the expense, and tend to the embarrassment of the plaintiffs in such cases, and create delay, which may be of some convenience to the defendants. It seems not to be sufficiently considered, that a character for fairness, and a willingness to meet objections, and facilitate the settlement of really disputed questions on fit occasions, would contribute much more to the honor and credit of the companies and their agents than a character for skill and adroitness in baffling investigation by unnecessary litigation and delay. For the purpose of considering the demurrer for want of equity, the material circumstances are, that the time appointed for the completion of the works has elapsed, and the works are not performed; that nothing impedes the completion of the works but want of money; that capital cannot at this time be raised, either by calls or by loans; that they have money arising from income which ought to be applied in satisfaction of their liabilities; and it is alleged, that the obligation to complete their works is a liability in the nature of a debt. The argument for the defendants is, that their acts do not require any such application of income, but clearly treat capital as a fund by means of which the works are to be executed, and that the capital is to be raised by shares and by money borrowed on mortgage or bond; that the company, not having raised all their capital, and being in a difficulty, which may be only temporary, in enforcing calls, or in borrowing

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on mortgage or bond, have a discretion as to the application or appropriation of their income, and that this discretion is not to be restricted or limited any otherwise than by express enactment. The plaintiff, on the other hand, alleges that the company, deriving their extraordinary powers from Parliament, are considered, and ought to be treated, as having contracted with the public to perform the works, and ought not to be allowed to divide any profits without completing the works; and having undertaken the execution of the works within a certain time, which has expired, are not, after the lapse of that time, justified in dividing any profits arising from their incomplete works, leaving the rest undone, either altogether, or for so long a time as may suit their convenience, or until a favorable opportunity may arise of raising money for the completion of the works, at a time when it would be advantageous to themselves to do so, by shares or by loans; that the expense of completing the works is the amount of a debt owing by the company, and ought to be taken into account in making up their balance sheet, it being unjustifiable to compute profit without taking debts into account. Having given my best attention to this case, and thinking it of very great importance and of some difficulty, I am, on the whole, of opinion that this bill cannot be sustained. The jurisdiction of this court has, in several cases, been very usefully applied in preventing or checking the erroneous conduct of corporations created by act of Parliament for public purposes; but it is not settled to what extent, or subject to what particular limitations, the jurisdiction ought to be exercised; and unless Parliament should think fit to lay down rules for the guidance of the courts, litigation to a considerable extent must, I am afraid, take place. The class of cases in which this court has often been called upon to interfere are those which arise out of a combination of acts which are in themselves illegal, and considered as breaches of contract with the public — acts which are breaches of contract, express or implied, with the subscribers to the undertaking, and acts erroneous, or breaches of contract incapable of being rectified by the shareholders themselves in the exercise of their own powers. In almost all cases it is necessary to distinguish two things, which, although they often are, and always ought to be, concurrent, are in themselves distinct, and are very apt to be confounded. There is the duty of the committee, directors, or governing body to the public, and their duty to the shareholders whom they represent. In this case the duty of the company to the public made it imperative upon them to complete their works in a limited time, and to let the works remain unfinished after the expiration of the time is a violation of their duty to the public, and a violation which, if permitted, would enable the company to do that which this court has repeatedly exercised its jurisdiction and power to prevent. If they are allowed to neglect the completion of their works until after the expiration of the time limited by the act, and are then allowed to make profit of so much as they have done, and to abandon the rest, it would seem that the means might at any time be found to abandon any part of their works at their own pleasure, and thus might extensive fraud be committed

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shareholders who had subscribed for the whole works. Such a violation of a duty to the public would show a most unfortunate state of the law, and be, in my opinion, a great injury to the public. But regarding this as a public wrong, or as a violation of duty to the public, it does not appear to me that this court has jurisdiction to interfere. The case does not appear to me to come within the authority of any decided case, or within the principle of the cases in which the court has interfered to prevent application of funds, subscribed for a whole purpose, to the completion of a part of it only; nor can it, I think, be safely said, that in no case whatever ought joint-stock companies to be allowed to divide any profits or receive any tolls until all their works have been completed. If Parliament so enacted, it would probably be much better for the public, and also much better for the companies or shareholders themselves; but it is plain that the affairs of a company might be in such a state, with such probability of being at any time able to raise all the capital required for the completion of their works, that there would be no risk whatever in dividing some interim profits. But so far as the public interest is concerned, I do not think that this court has, on such a bill as this, jurisdiction to interfere. As to the duties which the governing body of such a company owe to their constituents, the shareholders, this court does not attempt to direct the performance of all such duties, but, on the contrary, leaves to the companies themselves the enforcement of all the duties arising out of matters which are the subject of internal arrangement. It seems very improper, and very imprudent, to treat as profit any part of their funds or income, at a time when they are without the pecuniary means of performing the works which they are bound to perform, in the discharge of their duty to the public. The committee, with the sanction of the shareholders, are proceeding in a manner which (being attended with a constant breach of public duty) may result in the most serious injury to the shareholders themselves, in the same manner that any bad management injures those whose interests are affected by it; but they do it for themselves, and they must suffer the consequences. I think, therefore, that the demurrer for want of equity must be allowed. It appears to me that this court has not jurisdiction to interfere, on the mere ground that the defendants are acting in violation of their duty to the public, and that the misapplication of the income is a proper subject of internal regulation. I think I ought not to give the costs of this demurrer. I think it must be allowed without costs.

Ex parte Crosfield; *in re* The North of England Joint-stock Banking Company.

***Ex parte* CROSFIELD; *in re* THE NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY.¹**

April 16 and 17, 1851.

Joint-stock Companies Winding-up Acts — Contributory — Executor — Master's Jurisdiction to review.

A B was the proprietor of thirty shares in a joint-stock banking company. He died in 1838, having by his will appointed C D and E F executors, who proved the will, and in 1840 the probate was entered in the books of the bank. The name of C D appeared as executor on the dividend lists of 1845 and 1846, but on the warrants his name appeared without any addition, and notices were addressed to him alone. In his letters to the secretary he spoke of himself as executor of A B. In 1845, he, in his character of executor, transferred fifteen of the shares to a purchaser. The master had placed C D's name alone on the list of contributories, excluding E F, but on reviewing his decision he included E F:—

Held, that, under the 17th section of the act of 1849, the master had jurisdiction to review his decision, and that the name of E F was properly on the list.

In this matter a motion was made, on behalf of James Crosfield, that so much of the certificate or order of the master charged with the winding up of the North of England Joint-stock Banking Company, dated the 12th of March, 1851, as included the said James Crosfield in the said master's settlement of the list of contributories as a contributory for fifteen shares, in the character of one of the personal representatives of Ann Hall, deceased, might be discharged or reversed, and that his name might be struck out of the said list, and that the official managers might be ordered to pay him the costs incurred by him in defending the proceedings of the official managers in this matter, and of the present application. The certificate of the master was in substance as follows: "I, James William Farrer, hereby certify, at the request of James Crosfield, that the official managers made out, on the 22d of November, 1848, a list of contributories, wherein were included the names of the said James Crosfield and of Richard Hall, as contributories for fifteen shares of 100*l.* each, in the character of executors of Ann Hall, deceased; and on the 22d of December following, I settled the said list. After reading (among other documents) four dividend warrants payable to the order of the said Richard Hall, and hearing his admission that he had received dividends on the shares, and reading the letters of the said Richard Hall after mentioned, I included his name in the settled list of contributories as a contributory personally responsible for the said fifteen shares, and struck out the name of the said James Crosfield. I was, on the 28th of May, 1850, applied to by the solicitors of the official managers to reconsider and review my settlement of the list, and to alter the same, by placing the names of the said Richard Hall and James Crosfield thereon for the fifteen shares, in the character of personal representatives of Ann Hall, deceased. On the 26th of February last, I included the name of James Crosfield as a contributory in respect of the fifteen shares, as one of such personal representatives; and on the 7th of March I

¹ 15 Jur. 479.

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reviewed the settlement of the list as to the said Richard Hall, and included his name as a contributory in respect of the said fifteen shares, as one of such personal representatives. — J. W. Farrer." The facts were, that by deed of transfer, dated the 10th of March, 1835, thirty shares were transferred to Ann Hall, widow, with the consent of the managing directors of the bank, and the same was duly completed and registered. Mrs. Hall, by her will, dated the 19th of November, 1829, bequeathed the residue of her personal estate (which included the thirty shares) unto and equally between her son Richard Hall and her daughter Rebecca Hall, and appointed her said son and James Crosfield (the appellant) her executors. She died on the 30th of December, 1838, and her will was proved by both executors on the 13th of April, 1839. From the share ledgers of the company it appeared that "probate of Ann Hall's will was exhibited 9th of March, 1840," and the names of Richard Hall, her son, and James Crosfield entered as executors. In the dividend lists of 1845 and 1846 the name of Richard Hall appeared as Ann Hall's executor. The dividend warrants of March and September, 1845 and 1846, were made out in favor of "Mr. Richard Hall" only, and signed by the managing director or the managers of the company, "for the directors and company." Notices of matters of business, dated 1842, 1843, 1844, 1845, and 1846, were sent by the managers to Mr. Hall, and addressed to him without any reference to his being an executor, and in some of them speaking of his dividends on thirty shares. On the 7th of March, 1845, Mr. Hall wrote to the managers, — "I will thank you to remit the dividend on the thirty shares in the name of Ann Hall. . . Are there any other dividends due to the estate of Ann Hall?" On the 23d of September following, — "You would oblige me by forwarding the interest on the thirty shares of the late Ann Hall, which is in the name of Richard Hall, executor." On the 29th of September, 1846, — "I believe there was a dividend due from the North of England Bank on the 15th of this month. Will you please to remit me mine?" In his affirmation, James Crosfield stated, that he had had nothing whatever to do with the shares, and that it was Hall who exhibited the probate at the office of the bank. Before an intended sale of fifteen of the shares, Hall gave a notice of transfer as "executor of the said Ann Hall," and on the 15th of October he completed the transfer, and the same was duly entered in the books, and the consent of the directors in regular form signified therein.

Russell and Randall, for the motion. By the terms of the Winding-up Act, 1848, the master is concluded from making any alteration in the list of contributories when once settled by him, and he had, therefore, no jurisdiction to do as he did by placing the name of Mr. Crosfield on it. Lord Cranworth, in *Bes's Case*, 15 Jur. 54; 1 Eng. Rep. 197, so held. The motion, therefore, on that ground alone, ought to be granted.

Bacon and J. V. Prior, contra. One of the reasons for the passing of the act of 1849 was to supply the deficiencies in that of 1848, and

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among them to give the master jurisdiction to do as he has done here. The case before Lord Cranworth did not go on this point at all.

Knight Bruce, V. C. Whatever speculation there may be on the question of what ground Lord Cranworth went on, is set at rest; for although no reason appears in the report, his lordship informs me, by a note he has sent me, that he decided the master not to have jurisdiction, because the matter had before come before me. The present case, I am of opinion, is within the 17th section of the Winding-up Amendment Act, 1849, which empowers the master to reconsider and review any order or proceeding which may have been made by, or may have taken place before, him under the act, upon such terms and in such manner as he may think fit. I can conceive the possibility of a case in which the master could so exercise his discretion under this section as that it might be fit to bring the matter under the attention of the court, and the court might dissent from what had been done on the review, and direct that the matter should remain as it originally was. With regard to these acts, denominated "Winding-up Acts," I cannot help considering them as an attempt to form a system, though perhaps a rude one, of commercial law, which may be sought to be made the foundation on which to build, and possibly good may arise. I never thought the acts without merit, and it may be that they are the beginning of a system which may lead to useful results.

Russell and Randall. The whole course of proceeding, both on the part of Hall and of the bank, shows that Hall was treated as the absolute owner of the shares, and not as executor, although it is admitted that the term "executor," and the expression "as executor," occasionally occur.

Bacon and J. V. Prior were not called upon on the principal question.

Knight Bruce, V. C. How this case would have stood if Mr. Hall had not been an executor of the will of this lady, it is not necessary for me to say. He was an executor, and joined with Mr. Crosfield in proving the will of Mrs. Ann Hall, and therefore it appears to me that there is no case to show that he was owner, or that his membership of the company was in any character than that of executor of the will in question. No act which took place, no circumstance that occurred, between Mr. Hall and the company appears on the evidence to have taken place or to have occurred in any other character, or to be attributable to any other character, than that of executor. If any of the dealings between the company and Mr. Hall had been shown to be inconsistent with the proper dealings between them and an acting executor of a will, the case might have been different, but such dealings were consistent with such character. If it was correct in the master to review the decision he originally came to respecting the settlement of the list of contributories, and I think it was, I am of opinion that the master came to a correct conclusion on such review,

 Upfill's Case.

by placing the name of Mr. Crosfield on it in his character of executor. No circumstances appear to have arisen before the master to satisfy my mind that such ultimate conclusion at which he arrived was not a correct one, nor to satisfy my mind that the course he took in proceeding to review his former decision was otherwise. I wish to know whether the counsel for Mr. Crosfield consider he has a case to show that any circumstances took place which can alter Mr. Crosfield's position in consequence of the master's decision, or which render it inequitable that the master should have reviewed his decision.

[*Russell*. I have no information sufficiently explicit on that point.]
The motion must be refused.

Bacon. The official managers ask for costs against the appellant, who had no ground for the motion, whether on the question of the jurisdiction under the act of 1849, or on the other point.

* KNIGHT BRUCE, V. C. No, I shall not give costs; but the official managers will take their costs out of the estate.

 UPFILL'S CASE.¹

May 1, 2, and 28, 1851.

Contributory — Call.

No call should be made on any contributory until it has been ascertained to which of the debts established such contributory is liable.

It having been decided by the House of Lords, 14 Jur. 843, 1 Eng. Rep. 13, that Mr. Upfill was a contributory to the Direct Birmingham, Oxford, Reading, and Brighton Railway Company, a statement was prepared by the official manager, and brought before the master, as follows:—

“Financial Statement of the official Manager preparatory to a proposed Call on the Contributories in Class 1.

The total disbursements made on account of this company previous to its dissolution were . . . £10,174 11 5

“This sum has been raised in the following manner:—

From sixteen members of the provisional and management committee, for deposit on shares taken by them	£2047 10 0
From advances made by fourteen members of the provisional and management committee beyond	

¹ 15 Jur. 481.

Uppill's Case.

the amount of deposit on their shares, as above stated, for the purpose of paying the liabilities of the company	5974	12	5
From balances in the company's book, being deposits on shares paid by some allottees, and not reclaimed by them, and the contributions of other allottees towards the expenses of the company	2152	9	0
	<u>£10,174</u>	<u>11</u>	<u>5</u>

"In addition to these sums already paid, there are the following claims against the estate:—

Messrs. Jones & Nias for compensation, alleged by them to have been agreed upon by the committee of management, for the value of the scheme projected by them	£2000	0	0
Mr. J. B. Rayner, for salary due to him as secretary	702	14	5
Mr. Charles Vignolles, ditto, as engineer	152	19	6
Barker's charges for advertising	103	10	0
John Pringle, commission charges for distributing shares	146	0	0
Messrs. Spottiswoode, Gasden, De Capel Broke, Davies, and Thompson, members of the management committee, for sums expended by them on behalf of the company	3790	10	0
	<u>£6895</u>	<u>13</u>	<u>11</u>

"The list of contributories in the master's office is now finally fixed, as respects the liability of the forty-seven members of the provisional and management committee; of this number three persons are settled without liability in respect of shares. In regard to the allottee class, pending an appeal on the question of their liability about to be carried to the House of Lords, it is not intended to take any further proceedings. The official manager proposes a call on the forty-four members of the provisional and management committee of the deposit on their shares of 2*l.* 12*s.* 6*d.*, which would realize 8216*l.* 5*s.*; of this number sixteen have already paid the deposit; consequently, in practice, the call would not affect them; of the remaining twenty-eight, the official manager has not been able to effect service on several, from their change of residence, the letters of notices having been returned through the post-office, answer 'not known,' or 'gone abroad.' These circumstances reduce the number of persons to whom the proposed call will be applicable to twelve, representing 1150 shares, which, at 2*l.* 12*s.* 6*d.* per share, will produce a sum of £3018 15 0

In the event of the addresses of the other members of the committee being found, and the amount of the call recovered, a further sum will be produced of	3150	0	0
	<u>£6168</u>	<u>15</u>	<u>0</u>

Upfill's Case.

"In the last item is included the call on the 100 shares in the name of B. Best, which has been reserved from the operation of the present call, on account of a pending appeal before the chancellor. The total of 6168*l.* 15*s.* will be the maximum amount to be claimed from contributories of class 1; but, as an asset, it must be taken with considerable limitation,* particularly as respects the latter item, 3150*l.*, which, owing to the non-residence in England of many of the parties, and the difficulty in finding others, the call may not be responded to; at the present moment it is impossible to form an estimate of the amount of default that may accrue. With such limitation, on the ground of default, as may be considered reasonable, the above total of 6168*l.* 15*s.* will form a fund for the repayment of those members of the provisional and management committee who have advanced, for the uses of the company, the sum of 5974*l.* 12*s.* 5*d.* over and above the deposits which they have paid on their shares; added to which, there will be a certain proportion of the claims before mentioned probably admitted as proofs against the company."

The master thereupon, on the 10th of December, 1850, ordered that a call of 2*l.* 12*s.* 6*d.* per share be made on seventeen contributories, one of whom was Mr. Upfill. Mr. Upfill now moved that the order, making a call on him, should be discharged, and the official manager ordered to pay the costs of the application.

Rolt and Daniel, in support of the application. It is clear that when the master makes a call, he is bound to have before him the circumstances applicable to the class on whom he makes the call, and not make an arbitrary call. In deciding that Upfill was a contributory, the House of Lords merely decided that he was one of the persons who associated themselves together for the purpose of forming a company, but his liability to any particular debt still remains open. Suppose a creditor brought an action, and merely proved that Upfill was a member of the provisional committee, and held shares. These associations are not partnerships, and it must still be proved that Upfill had given authority to contract that particular debt. In *Bell v. Lord Mexborough*, 12 Jur. 65; 5 Railw. Cas. 149, the defendants were provisional committee-men, and allottees, and still held not liable. *Ashpitel v. Sercombe*, 19 L. J., Ex. 82. As to the decision of this case before the House of Lords, it is true that there cannot be a rehearing. *Stuart v. Agnew*, Macq. H. L. 437; but an erroneous judgment will be disregarded. There are no dates in the manager's statement, but items merely, and the master seems to have assumed that all the members of the provisional committee were liable, and that he could call for the deposit. *Re James*, 1 Sim. N. S., 140. Jones & Nias are the principal creditors, and Jones is the petitioner.

Bethell, for the official manager. We are not dealing with a partnership or company, but with an association for forming a company, and between the members is *ne nexus*, and they are only liable for their joint acts. The House of Lords has decided that Upfill's letter

Upfill's Case.

gave the committee power to bind him by their contracts: he is unquestionably liable to inquiry, and so has been put on the list of contributories. The principles of the Winding-up Acts are to be reduced to a simple form of proceeding; you are first to pay the creditors, and then settle the rights of the associates *inter se*. The master has an absolute discretion to make a call upon all the contributories for such amount as he shall think necessary, according to sect. 28 of the amended act, 12 & 13 Vict. c. 108.¹ The distribution of the amount to be left to subsequent proceedings. If a creditor had proceeded to recover his whole debt from any one partner, the partner could not have objected; and so in this case the contributory cannot object.

Roxburgh, (with *Bethell*.) In *Marsh's Case*, (before Knight Bruce, V. C.) there were no debts proved; and the only ground was, that the costs were estimated at 1000*l.*, and still a call was made, and not discharged. The master's power, under sect. 28 of the amended act, is quite discretionary.

[*Lord Cranworth*, V. C. It is not a question whether the master has put upon him more than he ought to bear. Suppose he was one of those who owed 1000*l.*, he could not complain if he had to pay the whole 1000*l.* But, suppose he was only liable to the payment of debts to the amount of 1000*l.*, and the master was to make him pay a call of 2000*l.*, the debts being 10,000*l.*, and he being only liable to 1000*l.*, could he be made to pay the whole 10,000*l.* ?]

There are a class of contributories who have accepted shares, and Upfill is one of them. The master has only made a call on those who are in the same position as Upfill, and liable to the same debts. The official manager must be paid, and there will be costs, to all of which Upfill is liable. It has never been decided whether, as between the parties themselves, a person who takes shares is not liable to contribute. The House of Lords has decided, that in the existing state of circumstances Upfill is liable to contribute. In *Wyld v. Hopkins*, 15 M. & W. 527, it was precisely the same, and that case established, that a man might be a contributory without being liable to exterior creditors. Unless it can be shown that there is a great abuse of the master's discretion, and that in no possible case could Upfill be called on, your lordship will not interfere with the discretion of the master.

¹ "And be it enacted, that so much of the said recited act 11 & 12 Vict. c. 45, as is contained in the section thereof numbered 84 in the copy of the said act printed by the queen's printer, shall be and the same is hereby repealed; and in lieu thereof, that when the master shall think proper to raise any money by means of a call, he shall make such call from time to time upon the contributories of the company, or any of them appearing for the time being upon the list of contributories, although it may then be under consideration or uncertain whether other persons ought or ought not to be included in the list: and in making any such call, it shall be lawful for the said master to fix such an amount per share for the same as shall in his judgment be likely to supply and bring in the whole sum for the time being intended to be raised, after taking into consideration the probability that some of the contributories upon whom the said call shall be made should partly or wholly fail to pay their respective proportions of the same."

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Rolt, in reply.

LORD CRANWORTH, V. C., May 28, 1851, delivered judgment to the following effect: This question arises on an order of the master of the 20th of December, 1840, ordering a call of 2*l.* 12*s.* 6*d.* per share to be made on several contributories, including Mr. Upfill, and this is a motion to discharge that order. The decision of the House of Lords settles, that Upfill is to be placed on the list of contributories as contributory for 100 shares. What is the effect of that? It decides, according to the interpretation clause, that he is liable to contribute to payment of some debt of a "company" — that is to say, the body of persons associated for forming a company. The last words of Lord Brougham's judgment expressly negatived the notion, that merely being placed on the list of contributories at all showed what was the extent of liability. The power of the master to make calls depends on sect. 83 of the old act, and sect. 28 of the amendment act. Taking the two together, it follows, that the master has absolute power to make calls on any contributory, i. e., by reasonable intendment, to the full extent of the whole sum to which such contributory would be made liable at law, besides costs. The party on whom a call is made has no right to complain, because others may be liable to the same debt; but that must be made matter of arrangement between himself and his co-contributors. But certainly the legislature could not have intended to authorize the master to make calls on a contributory for payment of debts in respect of which such contributory was not liable, and so to leave the contributory to get repaid by the parties who were liable. His lordship would even torture the language of the act to exclude such a construction; but no violence towards the language is necessary. Those sections fully meet the case; and it follows that the master cannot make a call on any contributory until he has decided in respect of which debts proved such contributory is liable. In the case of companies fully formed and completely registered, where the affairs to be wound up are strictly partnership concerns, this difficulty does not occur. But where the affairs wound up are the affairs not of a partnership, the members of which are all liable to every debt, but of an association of persons liable, some to one creditor, and some to another, then the most obvious principles of justice require, that before a call is made on any contributory, the liability in respect of which it is made should be ascertained. He may prefer paying it all off. If the master, having ascertained the liability, had exercised his discretion as to the proper amount of call, his lordship would have been very unwilling to interfere; but here the master has proceeded on an erroneous principle, as it seemed to his lordship, and, therefore, an appeal under sect. 99 of the Winding-up Act was quite proper. The order for the call must be discharged, with a declaration that no call ought to be made on any contributory until the master has first ascertained to which of the debts or liabilities proved or established before him such contributory is liable. It is true, that beyond this the contributory may be liable for a share of the costs of

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the winding up; but this did not seem to vary the case. The further question, as to what are the debts and liabilities to which Mr. Uphill is liable, was not properly before the court. The master must decide this, and then any party dissatisfied with his decision might bring the case before the court by way of appeal.

His lordship subsequently determined to make no declaration, and the order was simply discharged. Costs out of the estate.

STOKES v. SALOMONS.¹

May 13, 1851.

Will—Construction—Estate.

A gift by a will, within the operation of stat. 7 Will. 4 & 1 Vict. c. 26, of "all my estate and effects," unless restrained by the context, will pass after acquired real estate of which the testator dies seized.

The testator, by his will, gave, devised, and bequeathed all his estate and effects, whatsoever and wheresoever, and of what nature or kind soever, unto W. L. J., such estate and effects to be paid, assigned, or transferred to the said W. L. J. upon his attaining the age of twenty-one years; and in the mean time, and until he should attain that age, the interest, dividends, or proceeds of such estate and effects, or so much thereof, or so much of the principal thereof, as in the discretion of the executors should be necessary for that purpose, should be applied towards the maintenance, education, and putting forth in the world of the said W. L. J. The testator then appointed executors, whom he named guardians of W. L. J., and authorized them to invest his said estate and effects on real or personal security, and to alter, vary, and transpose the investment thereof, according to their discretion from time to time; and he directed them from time to time to repay and reimburse themselves out of his said estate and effects whatever costs and expenses might be incurred by them in the execution of his will. In the event of W. L. J. not attaining twenty-one, the testator gave, devised, and bequeathed unto his executors, or the survivor of them, all his aforesaid estate and effects:—

Held, that certain copyhold estates which the testator acquired after the date of the will, and of which he died seized to him and his heirs, passed under the will to W. L. J. and his heirs.

THIS was a special case submitted for the opinion of the court under the provisions of the stat. 13 & 14 Vict. c. 35. From the statements of the case it appeared that on the 13th of September, 1839, William Jenkyns executed a will in the following words: "This is the last will and testament of me, William Jenkyns, of Victoria Terrace, Hove, near Brighton, in the county of Sussex, and of Dudley, in the county of Worcester, iron merchant. In the first place, I revoke all wills by me heretofore made; in the next place, I give, devise, and bequeath all my estate and effects, whatsoever and wheresoever, and of what nature or kind soever the same may be, unto William Langford Jenkyns, now at the school of the Rev. Mr. Butler, at Brighton, such estate and effects to be paid, assigned, or transferred unto the said William Langford Jenkyns upon his attaining the age of twenty-one years; and in the mean time, and until he shall attain such

¹ 15 Jur. 483.

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age, the interest, dividends, or proceeds of such estate and effects, or so much thereof, or so much of the principal thereof, as in the discretion of my executors shall be necessary for the purpose, to be applied towards the maintenance, education, and putting forth in the world of the said William Langford Jenkyns. And I appoint Edmund Weyman Wadeson, of Doctors' Commons, London, proctor, and Richard Green, of Brighton aforesaid, ironmonger, executors of this my will, and guardians of the said William Langford Jenkyns, and I authorize them to invest my said estate and effects on real or personal security, as to them shall appear advisable, and to alter, vary, and transpose the investment thereof, according to their discretion, from time to time; and I direct that my said executors may from time to time repay and reimburse themselves out of my said estate and effects whatever costs and expenses may be incurred by them, or either of them, in the execution of this my will, and that they shall not be answerable or accountable in any manner for any sum or matter whatever, other than shall be received, paid, or done by them respectively, and each for himself only, and not the one for the other; and that the receipts of my said executors, or the survivor of them, or their or his signature for any purpose in the execution of this my will, shall be valid and effectual for all purposes whatsoever; and I give and bequeath unto my said executors a legacy of 100*l.* each; and in the event of the said William Langford Jenkyns not attaining the age of twenty-one years, I give, devise, and bequeath unto them, or the survivor of them, all my aforesaid estate and effects. In witness," &c. The testator some time afterwards died seized to him and his heirs, according to the custom of the manor of which the same were holden, of certain copyhold estates, but of which he was not seized at the date of the will. After the death of the testator, William Langford Jenkyns was admitted, as devisee of the copyholds under the will, tenant thereof to him and his heirs, according to the custom of the manor. Having attained his majority in April, 1850, he in that month sold the premises to the plaintiff. In June, the plaintiff was admitted tenant, and in his turn, on the 9th of August, contracted to sell the premises to the defendant. The defendant, alleging that it was doubtful whether the copyholds passed to William Langford Jenkyns by the will, objected to the plaintiff's title, unless the concurrence of the customary heir of the testator could be procured. The case submitted the question of construction to the court.

T. W. Greene, for the plaintiff. The date of this will is subsequent to the passing of the Wills Act, 1 Vict. c. 26. The testator must be considered to have been acquainted with the enactments comprised in that statute, and the will must be construed accordingly. Now, by the combined effect of the 3d and 24th sections of that statute, a general devise of real estate will operate on all property of that description to which the testator may be entitled at his decease. The will, in fact, must be considered with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the testator's death. If,

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then, the words of the will are large enough to embrace the real property of the testator, such property will pass whether acquired by him before or after the date of the will. It is submitted that the general words "estate and effects," which occur both at the beginning and end of this will, are sufficient to pass the real estate of the testator, and that their natural effect is not narrowed or restricted by the context. The first question is, Do the words "estate and effects," according to their natural and legal meaning, include the real estate? If they do include it, then the rule of construction is to give them that effect, unless from the context it appears "by declaration plain" that the words are used by the testator in a different sense, or unless extrinsic circumstances exclude the usual and legal meaning of the words. *Ford v. Ford*, 6 Hare, 486. In the present case there are no extrinsic circumstances; and it is submitted that the context does not furnish a "declaration plain" restricting the word "estate" to personalty. That real estate will pass under the general word "estate," when unrestricted by the context, has been held in numerous cases. *Doe d. Evans v. Evans*, 9 Ad. & El. 720; s. c. 1 Per. & D. 472. *Doe d. Hick v. Dring*, 2 Mau. & S. 448. *Woollam v. Kemoorthy*, 9 Ves. 137. *Ford v. Ford*, ubi sup. *Doe d. Evans v. Walker*, 19 L. J., Q. B., 293. *Morrison v. Hoppe*, 17 Law T. 1. And this notwithstanding the absence of a specific devise of lands in the will. *Tanner v. Morse*, Cas. T. Talb. 284. *Doe d. Wall v. Langlands*, 14 East, 370. There is nothing in the context of this will amounting to "declaration plain" that the word "estate" should be confined to personalty. The words "give, devise, and bequeath," have reference both to realty and personalty. If personalty only were meant, "bequeath" would have been sufficient. So, "pay, assign, and transfer," though ordinarily referable to personalty, are not necessarily referable thereto. "Interest and dividends" refer to personalty only; but "proceeds" may have reference to real estate. The word "invest" may be meant to apply to such portions only of the estate as require investment.

J. T. Wood, contra. The context is to be read as explanatory of the sense in which the testator uses particular words, and for that purpose the whole will is to be spelt. *Hamilton v. Hodgson*, 6 Moo. P. C. 76; s. c. 11 Jur. 193. *Saumarez v. Saumarez*, 4 My. & C. 331. In all the cases the principle is recognized, that the real estate will not pass under general words, unless the context of the will be not inconsistent with its passing. In the cases which have been cited for the plaintiff, the question was, whether the words would pass real estate, *proprio vigore*, without reference to any context; but words as strong as those occurring in this will have, in many cases, been restrained to personalty by the context. *Newland v. Marjoribanks*, 5 Taunt. 268. *Doe d. Hurrell v. Hurrell*, 5 B. & Al. 18. *Doe d. Spearing v. Buckner*, 6 Durn. & E. 610. *Sanderson v. Dobson*, 1 Exch. 141. It is submitted, that, upon a case so doubtful upon the authorities, the court will not compel the defendant to accept the title.

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Greene, in reply. The question of specific performance is not now before the court, but the question of construction only. The *onus* is upon the defendant to show that the word "estate" is not used by the testator in its natural sense. He must show a "declaration plain" upon the context. In *Newland v. Marjoribanks*, the gift was of the estate which the testator might be possessed of or interested in at the time of his death. In the then state of the law, the will could have no operation on after-acquired realty; and these words, therefore, could have no legal meaning, except as to personalty. The law has now, however, placed realty and personalty upon the same footing. In *Doe d. Hurrell v. Hurrell*, and *Doe d. Spearing v. Buckland*, the gift of estate was coupled with "executors and administrators," as words of limitation. *Saunderson v. Dobson* was a conflicting decision with that of another court of law, to which the same will was referred. It is submitted that, *reddendo singula singulis*, all the words in this will may be reconciled without excluding the real estate.

SIR GEORGE TURNER, V. C. The case having been so fully and fairly argued, I think I can at once give my opinion upon this will. Could it have answered any useful purpose, I would have suspended my judgment, and referred to the authorities; but I feel satisfied, both from the cases which have been cited and from my own recollection of the authorities upon the question, that no general rule applicable to every case can be laid down. In each particular case the question, whether real estate passes or not under the general words of a will, is to be determined only from the intention of the testator as expressed in the will. All that can be done is to collect the intention from the context of the whole will; and it is the duty of the court to examine, with this object in view, every clause of the will, and apply thereto the general rules of construction adopted by the courts. Now, it is a well-established rule of construction, that general words must be allowed their full effect, unless it is perfectly clear that such effect is controlled by the context. In considering the circumstances under which the testator in this case made his will, and the cases cited in support of the passing of the real estate, this fact appears. The will was made after the passing of the Wills Act, 1 Vict. c. 26, and with a knowledge, therefore, of the provisions of that act; for the testator must be presumed to have a knowledge of the contents of the act of Parliament. The testator, therefore, must be presumed to have known, that if he used general words of disposition applicable to real estate, and competent to pass such estate, those words would operate upon all the real estate of which he might die seized, although he had not a single acre of land belonging to him at the time of making his will. Examining, then, the dispositions contained in the will, while bearing in mind that, at the time he wrote, the testator knew, or must be considered as knowing, that any future acquired real estates, would pass by any general words in the will, which were large enough to embrace real estate, first, the testator says, "I give, devise, and bequeath," the word "devise" being a word of itself applicable to real estate. The testator pro-

ceeds, "all my estate, and effects, whatsoever and wheresoever," the word "wheresoever" pointing to locality, and being, therefore, peculiarly applicable to real estate. He does not stop there, but goes on to say, "of what nature or kind soever the same may be." A clear intention appears on the will, therefore, to pass all his property wheresoever, and of whatsoever nature, and to give it to William Langford Jenkyns. The words I have just referred to, if standing by themselves, would undoubtedly pass real estate. It can hardly be contended that they would not pass it. Then come other words, which may or may not operate to control those general words. It is very remarkable, and it shows the necessity of attending closely in each case to the particular language of the will, that the clause, which created in my mind the greatest difficulty, was not particularly commented upon during the argument. It is the clause directing that the testator's estate and effects are to be "paid, assigned, and transferred" to the children of William Langford Jenkyns on their attaining the age of twenty-one years. No doubt, the words "pay, assign, and transfer," in their more ordinary sense, apply rather to personal than to real estate; but they are not necessarily confined to personal estate. It is clear that real estate may be said to be transferred by any conveyance by which it passes from one owner to another. The testator, after directing it to be transferred to the children on their attaining twenty-one, goes on to say, that in the mean time "the interest, dividends, and proceeds of such estate and effects" — I may observe, the word "proceeds" would clearly include both real and personal estate. The testator directs "the interest, dividends, and proceeds of such estate" — then come the words which I confess, in the first instance, embarrassed my mind, and which, but for the case of *Saumarez v. Saumarez*, I should have felt a difficulty in getting over. The words are, "the interest, dividends, and proceeds of such estate and effects, or so much thereof, or so much of the *principal* thereof, as in the discretion of my executors shall be necessary for the purpose, to be applied towards the maintenance, education, and putting forth in the world of the said William Langford Jenkyns." The words "so much of the *principal* thereof" cannot be applied to real estate. By that word most of the difficulty in my mind during the argument was created. He then goes on, and appoints executors of his will, whom he names guardians of William Langford Jenkyns, and he authorizes them "to invest his said estate and effects on real or personal security." Upon these words another difficulty arises, just the same as the difficulty on the word "principal," and one which must be answered in the same manner. Then come the words, "I direct my executors to repay and reimburse themselves out of my said estate and effects." I think that may apply both to real and personal property. There is nothing more in the will, except that in the event of William Langford Jenkyns not attaining the age of twenty-one, the testator gives, devises, and bequeaths all his aforesaid trust estate and effects to his executors. Upon that will nothing can be more clear than that the testator did not intend to die intestate as to any portion of the property belonging to him, either at the period

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of his will or of his death. Words occur in the will, and in the devising clauses thereof, peculiarly applicable to real estate, and which are, undoubtedly, competent to embrace such estate.

Now, let us consider the authorities applicable to the question. The first case cited is *Newland v. Marjoribanks*, 5 Taunt. 268. There the devise was of the residue and remainder of the testator's estate, of what nature or kind the same might be, and of which he might be possessed or interested in at the time of his decease. Now, the word "possessed" is peculiarly applicable to personalty, and a gift coupled with that word would, *prima facie*, imply personal estate. The next case cited was that of *Doe d. Spearing v. Buckland*, 6 Durn. & E. 610. Here the words are, "all the rest, residue, and remainder of my estate and effects, of any and what nature or kind soever, I give and bequeath the same unto A and B, their executors or administrators." There you get a devise of estate and of personal property, coupled with a limitation, which shows, *prima facie*, that personal property is meant. The next case cited was that of *Doe d. Hurrell v. Hurrell*, 5 B. & Al. 18, in which there is a disposition of residue to trustees, *their executors, administrators, and assigns*. The case of *Morrison v. Hoppe*, 17 Law T. 1, was decided the other way. *Woollam v. Kennerley*, 9 Ves. 137, seems to have gone on this. In that case there was no devise of the estate and effects in terms; the devise was of fee farm rents on formal trusts for sale. The testator directed also the furniture to be sold, and trusts were then declared as to the money to arise from the sale of the rents and furniture, and from all other his estate and effects, of what nature or kind soever. It was not a devise of the estate and effects, but of the moneys to arise from all other his estate and effects. Therefore, in order that the real estate might pass by the words "estate and effects," it was necessary to create a trust for sale in the heir, on whom the legal estate descended. As, however, the testator had in the previous part of the will created a particular trust for sale of a particular portion of the property, the court said, that where he had intended a sale he had created a particular trust for the purpose, and that it could not, therefore, be inferred that the testator intended that real estate, not included in the express trust, should be included in the general word "estate," so as to pass thereby. Then came the case of *Saumarez v. Saumarez*, 4 My. & C. 331; that appears to me to govern the present case in principle. There the testator gave to his son Richard, his heir at law, his freehold lands in Dorsetshire, and directed the residue of his property which he might leave at his death to be divided between that son and his two sisters, in equal proportions, with a direction, that whatever portion might devolve to him, the son, should be placed in the names of trustees, and the interest be paid to him for life; and that, after his death, the share belonging to him should be divided between his children, and placed in the names of trustees, with a power to employ the interest in their maintenance and education, and a discretionary power to employ a portion of the capital for their advancement and settlement in life; and after each of them should have attained the age of twenty-five, the whole of

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their share to be transferred to them. The same expression, "transfer," occurs there as in the present case. Should his son Richard die without issue, the whole of the portion which might have been placed in trust for him was to devolve to the testator's two sisters during their life, in equal proportions, and after their death to their children. There, Lord Cottenham held, that the reversion in fee in the particular estate devised to his son Richard passed under the disposition of residue of the property which the testator might leave at his death, notwithstanding there was a specific direction in the will, which clearly, in terms, had reference to personal estate. Why did he so hold? Because the testator had shown that he had real estate in his mind, by the disposition he had made to his son of a life interest only in that particular real estate. Now, applying that principle here, does not this testator know the Wills Act? Does he not know that his real estate would pass if the words would pass them? Having that knowledge, does he not use legal words referring to real estate? Now, the case of *Saumarez v. Saumarez* also relieves me from the difficulty which I have felt on the word "principal," and also on the word "transfer;" because there I find the same expression is used as to transfer, and the same expression as to interest being paid to the beneficiary during life, and after his death that his share should be divided between his children, and placed in the names of trustees. *Prima facie*, "share" would not apply to real estate. Now, if Lord Cottenham gets over that difficulty by considering the words as applied to that portion only of the testator's estate capable of being taken in that particular mode, so, in this will, where I find the words "interest, dividends, &c., of such estate and effects to be applied in maintenance, and so much of the principal," &c., I must adopt the same rule of construction as Lord Cottenham in *Saumarez v. Saumarez*, and consider the words "so much of the principal" as applying to so much or to such portion of the estate as will consist of principal applicable to the particular purposes of the gift. The result is, that on consideration of the context of the whole will, I find nothing of necessity controlling or confining the meaning of the general word "estate" — a term which, in its literal sense, is strictly applicable to real estate. My opinion therefore is, that the copyhold premises in question passed by the will. I have given my opinion upon this will without further reference to the authorities, as the case, like most questions of construction, depends more upon the general spelling of the context than upon the application of any general rule to be gathered from the authorities; and I have done so the more readily, from my recollection of numerous instances in which contradictory certificates have been returned by courts of law, when questions of construction have been referred to them by this court. Where a general rule can be found applicable to the case in hand, it is the clear duty of the court to apply it; but, ordinarily, the only duty imposed upon the court, having regard to the various language of wills, is to carry out the general intention of the testator, as expressed upon the context of the whole will.

 Bensusan v. Nehemias.

BENSUSAN v. NEHEMIAS.¹

April 20 and 25, 1851.

Breach of Trust — Satisfaction — Will — Construction.

Stock was transferred into the names of three trustees, on trusts of a marriage settlement. There was a power to alter and vary securities with the consent of the husband and wife. All the trustees transferred 2000*l.*, part of the fund, to the husband, and the same was sold out, and the produce used by him and his copartners, one of whom was one of the trustees. Two of the trustees became bankrupt. The other trustee, who was the father of the wife, by his will, gave 6000*l.*, new 3*l.* 10*s.* per cents., to the trustees of the settlement. His will contained the following direction: "For giving my daughter her legacy of 6000*l.*, new 3*l.* 10*s.* per cents., I order and direct, that whatever foreign bonds A. B. & Co. should have of mine be sold, and the produce thereof, with my balance of accounts with the said house, shall be added, for purchasing the said legacy." The testator also directed his bankers to pay all his dividends, and his balance of accounts with them, to his wife during her life, after having paid his legacy and debts. A suit was instituted against the executor of this will for a replacement of the 2000*l.* out of the estate, and another suit was instituted by the same party against the executor for payment of the 6000*l.* legacy:—

Held, that the gift of the 6000*l.* was a satisfaction of the 2000*l.* and interest.

THERE were two suits between the parties, one of which was instituted to enforce the replacement of stock sold out by trustees, in breach of trust; the other, a legatee's suit, and for the administration of the estate of the deceased and only solvent trustee. The facts were these: By indenture made on the 27th of November, 1822, between Menaham Levy Bensusan, of the first part; Joshua Levy Bensusan, of Gibraltar, Samuel Levy Bensusan, and Abraham Levy Bensusan, of the second part; and Jacob Levy Bensusan and Sarah Levy Bensusan his wife, of the third part; after reciting that, on or about the 26th of June last, a marriage was duly solemnized between the said Jacob Levy Bensusan and Sarah Levy his wife, (then Sarah Levy Bensusan, spinster,) and reciting that two sums of 5250*l.*, new 4*l.* per cent. consolidated bank annuities, had been transferred into and were then standing in the joint names of Joshua Levy Bensusan, Samuel Levy Bensusan, and Abraham Levy Bensusan, it was declared that the trustees should have possession of the said stock, upon trust to pay the dividends to Mrs. Bensusan for her life, or as she should appoint, for her separate use, but without power of anticipation; and after her death, to Jacob Levy Bensusan, her husband, for his life; and after both their deaths, upon trust for the children of their marriage. The deed contained a power as to the variation of securities with the consent of the husband and wife, or of the survivor of them, and to lay out and invest the moneys arising thereby in or upon any other parliamentary stocks or public funds of Great Britain, or any real securities in England, but there was no power to lend the money on personal security. There was then a power to lay out any part of the stock in the purchase of freehold estate in England, with powers of resale, &c. The stock was afterwards converted by act of Parliament into new 3*l.* 10*s.* per cent. bank annuities. There were twelve children of the marriage between Mr. and Mrs. Jacob Levy

¹ 15 Jur. 503.

Bensusan v. Nehemias.

Bensusan. In the month of September, 1831, all the trustees concurred in making a transfer of 2000*l.*, part of the stock, to Jacob Levy Bensusan, the husband, for the purpose of the same being sold out, and the same was so sold out without the consent or knowledge of Mrs. Jacob Levy Bensusan, and the produce was lent to the partnership firm, in which the husband, and Samuel Levy Bensusan, one of the trustees, and Menaham Levy Bensusan, another of the trustees, and one other person, were partners, no security being taken for the same. In November, 1841, Abraham Levy Bensusan, one of the trustees, became bankrupt. In November, 1847, Samuel Levy Bensusan, another of the trustees, Jacob Levy Bensusan, the husband, Menaham Levy Bensusan, the other trustee, and their partner, became bankrupt. The dividend on each of the estates was extremely small. A correspondence took place, both before and after the sale of the stock, between Mr. Jacob Levy Bensusan, the husband, and Mr. Menaham Levy Bensusan, at Gibraltar, the father-in-law, and one of the trustees, relative to the sale of the stock and to its replacement; and also between Mrs. Jacob Levy Bensusan and her father-in-law, Mr. Menaham Levy Bensusan, at Gibraltar, speaking generally and indirectly of the affairs of her husband, but not referring to the sale of the stock or the application of the money. Joshua Levy Bensusan, the only solvent trustee, made his will, thirteen years after the breach of trust was committed, and the same was dated the 12th of March, 1844, and thereby, amongst other bequests, he gave and bequeathed as follows: "I will, leave, and direct the sum of 6000*l.*, new 3*l.* 10*s.* per cents., to be brought and transferred to and placed in the names of the trustees of the marriage settlement of my dear daughter, Sarah Levy Bensusan, and in the name of Mr. Abraham Nehemias, whom I appoint to be a trustee in my name and stead for this purpose; my dear wife, Mrs. Judith Levy Bensusan, to be my executrix, and my brother-in-law, Mr. Abraham Nehemias, to be my executor. None of the legacies to be paid until six months after my decease." The testator further bequeathed as follows: "For giving my dear daughter, Sarah Levy Bensusan, her legacy of the above-mentioned 6000*l.*, new 3*l.* 10*s.* per cents., I order and direct, that whatever foreign bonds the house of Messrs. Menaham Levy Bensusan & Co., of London, should have of mine in their possession, as specified in my waste book, fol. 398, shall be sold, and the produce thereof, with my balance of accounts with the said house, shall be added for purchasing the aforesaid legacy." At the close of his will the testator thus expressed himself: "I direct the said Messrs. Stone, Martin, & Stone to pay all my dividends, and my balance of accounts with them, to my dear wife, Mrs. Judith Levy Bensusan, after my decease, during her life, after having paid my legacy and debts." The testator died on the 27th of October, 1847, about a month before the bankruptcy of his son-in-law and his co-trustee, Samuel Levy Bensusan. The first suit was instituted by Mrs. Jacob Levy Bensusan against Mr. Nehemias, the executor, and others, setting forth the breach of trust, which prayed, "that it might be declared, that, under the circumstances aforesaid, the estate of the testator was liable to make good and replace the 2000*l.*, new 3*l.* 10*s.*

Bensusan v. Nehemias

per cent. annuities, together with the amount of dividends which would have been payable thereon in case the same had not been transferred or sold, from the time of the transfer or sale up to the then present time, and for an account of the amount due to the plaintiff in respect of such dividends." The defendant, Mr. Nehemias, in his answer, made the following admission and submission: "He admits it to be true that there were, at the time of the death of the said testator, and that there now are, standing in his name in the books of the governor and company of the Bank of England very large sums of stock, amounting to the sums 5550*l.*, 3*l.* per cent. consolidated bank annuities, and 31, 250*l.*, 3*l.* 5*s.* per cent. bank annuities; but whether such last-mentioned sums, or whether or not, together with the other personal estate and effects of the said testator, are now liable to satisfy, and ought to be applied in satisfaction of, the said plaintiff's demands in this suit, and the other debts of the said testator, this defendant saith he submits as a matter of law to the judgment of this honorable court." The bill in the administration suit, also instituted by Mrs. Bensusan, to which her children were parties, and in which the executor, Mr. Nehemias, and other persons, were defendants, prayed, "that the trusts of the will of the testator, so far as related to the bequest of 6000*l.* to the trustees of the settlement of the plaintiff, might be performed and carried into execution, by and under the direction and decree of the court; and that the defendant, Abraham Nehemias, might be decreed to pay or secure the 6000*l.* so given in trust as aforesaid, and that the same might be paid out of the testator's estate." In his answer to this second bill, Mr. Nehemias submitted as follows: "This defendant submits it as matter of law to the judgment of this honorable court, whether it was the intention of the testator, and whether such is the true construction of the said bequest, that the sum of 6000*l.*, new 3*l.* 10*s.* per cent. bank annuities, in the said bill mentioned, should be settled and secured in the hands of the trustees of the said marriage settlement of the said plaintiff and this defendant, upon trust for the sole and separate use of the said plaintiff, independently of her said husband, or whether the same ought to be settled and secured accordingly."

James Parker and *Hetherington*, for the plaintiff, argued that the direction of the testator, that his debts and legacy should be paid, was a circumstance to show that he did not intend a satisfaction; beyond that, that as the wife was entitled to a life interest under the settlement, it could not be said that the gift of the capital was a satisfaction of the arrears due to her. The court is always astute in finding reasons against the applicability of the rule of satisfaction, and very slight circumstances have been seized on to rebut the presumption, that a testator means by a bequest to satisfy a debt.

Bacon and *Leach*, for the children of the marriage.

Swanston and *T. Stevens*, for the executor.

Goodeve, Renshaw, and Rogers, for other parties.

The following cases were cited: *Carr v. Eastabrooke*, 3 Ves. 561. *Rawlins v. Powell*, 1 P. Wms. 296. *Atkinson v. Webb*, Pre. Ch. 286. *Nicholls v. Judson*, 2 Atk. 300. *Haynes v. Vigo*, 1 Bro. C. C. 129., and *Clarke v. Sewell*, 3 Atk. 96.

KNIGHT BRUCE, V. C. I think that, according to the true construction of the will, the gift of the stock was one neither to the trustees beneficially nor to the daughter. The only plausible argument in favor of any claim of the daughter to take beneficially the fund itself is that where the testator says, "For giving my dear daughter, Sarah Levy Bensusan, her legacy of the above-mentioned 6000*l*." Then comes the question on the words directing the non-payment until six months after the testator's death, and the mention at the close of the will of the payment of the testator's debts. Without giving any opinion or making any observation on any other case, I am clearly of opinion, that in the present those two circumstances are much too slight to be of any weight, to make any difference in the case. The testator, by means of a breach of trust, was indebted to a trust fund, of which he was a trustee, in a sum of 2000*l*. He gave the same trust fund 6000*l*. I am of opinion, on that statement, that the presumption of law must be satisfaction. I think there is not any thing in this case to convince or persuade me that such presumption is displaced or answered. I am of opinion that it is a satisfaction, in the sense in which that term may be used; that is, a satisfaction as between all persons interested under the settlement — interested in that respect — and the testator's estate. Without giving any opinion as to the discharge or absence of discharge of any other person from the consequences of this breach of trust, I consider that the testator's estate is liable to make good the fund. As to who is or not entitled after the death of the daughter it is not necessary to say any thing, but she is entitled for life; and in regard to the arrear of income, and the arrear of interest due in respect of the daughter's life interest, there is nothing to put this stock on a different footing. There is certainly some difficulty in saying a demand, which is in a sense an entire demand, can be applied as a satisfaction of part and not the rest. That point presents itself to my mind, and most material it is. I do not think, however, I ought to make any difference on what appears to be the truth and substance of the case. I am of opinion, however, that that point ought to be decided. There is satisfaction here by the 6000*l*. stock.

A decree was made accordingly, and the plaintiff was allowed her costs of the legatee's suit, excepting so far as they had been increased by the other suit.

In re The Trustee Act, 1850; *in re* The Estate of Catherine Meyrick.

In re THE TRUSTEE ACT, 1850; and *in re* THE ESTATE OF
CATHERINE MEYRICK, deceased.¹

May 13, 1851.

Trustee Act, 1850 — Vesting Order — Mortgagee.

Petition by the personal representative of a deceased mortgagee in fee, stating that the mortgagee had died intestate as to the mortgage premises, and without having entered into possession, or into the receipt of the rents and profits thereof; that it was unknown who was the heir of such mortgagee, and praying an order vesting the legal estate of the mortgage premises in the petitioner, as the person entitled to receive the mortgage debt. Order refused, the court holding that the case did not fall within the provisions of the act.

THIS was the petition of the administrator of a deceased mortgagee in fee, stating that the mortgagee had died intestate as to the mortgage premises, and that neither she nor those claiming under her had ever been in possession of such premises, or in the receipt of the rents and profits thereof; that it was not known who was the heir at law of such mortgagee; that the legal estate in the premises was vested in such heir; and praying an order vesting the premises, subject to the equity of redemption, in the petitioner in fee, as the person entitled to receive the mortgage debt.

H. Stevens, for the petitioner, asked for a vesting order, under the 19th section of the act.

SIR G. TURNER, V. C., said he was of opinion that the case did not fall within the provisions of the statute. The 19th section required that "the money due in respect of the mortgage should have been paid to a person entitled to receive the same." This had not been done in the case before him. So long as the mortgage moneys remained unpaid, equities might exist as between the heir and the personal representatives of the mortgagee. The requisition of the 19th section, which he had just referred to, would seem to indicate an intention on the part of the legislature to prevent any dealing with such equities by the court. Throughout the act, "a mortgage" was carefully distinguished from "a trust;" and he thought that the case before him could not be brought within any section of the act. He must, therefore, decline to make any order upon the petition.

¹ 15 Jur. 505. 20 Law J. Rep. (N. S.) Chanc. 336.

In re Strachan's Estate.

*In re STRACHAN'S ESTATE.*¹

May 29 and 30, 1851.

Costs under the Metropolitan Improvement Acts.

Under the construction of the Metropolitan Improvement Act, 3 & 4 Vict. c. 87, s. 49, authorizing the court to order the expenses of all purchases to be made in pursuance of the act to be paid by the commissioners of woods and forests, the court declined to make an order for payment, either by the commissioners, or out of the corpus of the compensation money paid in under the act, of the costs occasioned to a tenant for life of settled estates purchased under the act, by making out her title or otherwise, in consequence of the land being taken.

F. J. Wood, for the petitioner, the tenant for life of some settled estates, part of which had been taken by the commissioners of woods and forests, under the Metropolitan Improvement Acts, 3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34, asked that the petitioner's costs of proving her title to the land, and otherwise incurred, in consequence of its having been taken by the commissioners, might be ordered to be paid by the commissioners. The purchase money had been paid into court, under the 44th section of the stat. 3 & 4 Vict. c. 87, and the present application was made under the 49th section.²

W. M. James, for the commissioners, objected to the payment asked, observing that the same words, as to payment of the costs of purchases, were used in the old railway acts, and that they had been construed by the courts not to include the costs claimed by the petition.

SIR G. TURNER, V. C., said he could not order the costs to be paid by the commissioners.

F. J. Wood then asked that the costs might be paid out of the *corpus* of the compensation money, prior to its being invested in consols; and he referred to an unreported case, in which an order to that effect appeared to have been made in 1843, by the late vice chancellor of England.

¹ 15 Jur. 505.

² The 49th section enacts, "that where, by reason of any disability or incapacity of the body or bodies, trustee or trustees, corporation or other person or persons entitled to any houses, buildings, ground, tenements, or hereditaments, or part or parts thereof, or share or shares, estate or estates, interest or interests therein, or charge or charges thereon, to be purchased or taken under the authority of this act, the purchase money for the same shall be required to be paid into the Bank of England, in the name and with the privity of the accountant general of the Court of Exchequer, and to be applied in the purchase of other lands, tenements, or hereditaments, to be settled to the like uses, in pursuance of this act, it shall be lawful for the said court to order the expenses of all purchases from time to time to be made in pursuance of this act, or so much of the said expenses as the said court shall deem reasonable, to be paid by the said commissioners, who shall from time to time pay such sum or sums of money, out of the moneys applicable to the purposes of this act, as the court shall direct."

In re Strachan's Estate.

SIR G. TURNER, V. C., said the question appeared to be, whether the act gave him power to make the order suggested; and that he doubted his power to administer equities between the parties. As, however, he was sensible of the hardship upon the tenant for life, he would direct inquiries to be made as to the practice pursued by the other judges.

May 30, 1851. SIR G. TURNER, V. C. said, that upon inquiry of the registrar, he had been informed that the practice was to give the costs according to the terms of the act of Parliament. He had also referred to the authorities. The case of *Mitchell v. Newell*, 3 Railw. Cas. 515, in which the court refused to depart from the literal construction of the act, was, he thought, exactly in point. In *Ex parte Cooke*, 3 Railw. Cas. 135; s. c. 7 Jur. 639, a petition was presented by the tenant for life of lands taken by a railway company, praying the interim investment in the funds of the purchase money, which had been paid into court by the company. By the terms of the act in that case the court had power to order the expenses of "all purchases" made in pursuance of the act to be paid by the company; and it was there held, that the court had no power to order payment of the costs of that investment, subsequent railway acts having put a statutory construction upon the words "expenses of all purchases," used in the former acts, by the insertion of a clause directing the costs of such interim investments to be borne by the company. So, in *Ex parte Molyneux*, 2 Coll. 273, Knight Bruce, V. C., had, on the ground that the act gave him no jurisdiction, and that it had been so held in a series of cases, reluctantly declined to make any order as to the costs of an application by the vendors to have payment out of court of part of the purchase money paid in by the purchasers, the Liverpool and Manchester Railway Company. That being the state of the practice and of the authorities, he, the vice chancellor, could do nothing to help the petitioner; he had no power to make the order.

F. J. Wood said that there was no decision to the effect that the costs could not be paid out of the capital.

SIR G. TURNER, V. C., said that had been in effect decided by the late vice chancellor of England, in *Ex parte Cooke*. The order there was, that the costs should be paid by the tenant for life, which was in effect deciding that the costs could not be paid out of the capital. The principle of the decisions was, that the court had no power except that which it derived from the act of Parliament.

 Wayne v. Hanham & others.

WAYNE v. HANHAM & others.¹

May 9 and June 3, 1851.

Mortgagee of reversionary interest in Stock, Right of, to Foreclosure.

A mortgagee of a reversionary interest in stock in the public funds, with a power of sale, cannot be called on to submit to a decree for sale, but he may proceed by bill for foreclosure; and he is entitled to a decree in the common form for an account, and, in default of payment, for foreclosure.

THE plaintiffs were the personal representatives of a first mortgagee, with power of sale, of a reversionary interest in two sums of 9900*l.* reduced bank annuities, and 9900*l.* consolidated bank annuities. The defendants were the mortgagor and personal representatives of a second mortgagee. The bill, after stating that an ineffectual attempt to sell by auction had been made under the power, prayed for payment of the mortgage debt, or foreclosure. On the 3d of May, 1851, a decree was pronounced for payment or for a sale, the court being under the impression, that a decree for sale, and not for foreclosure, was the proper form of decree, where the mortgage was of a reversionary interest in stock. The plaintiffs afterwards found authority in favor of a decree for foreclosure, and upon their application the cause was again set down to be spoken to on the minutes.

Kenyon Parker, for the plaintiffs, asked for a decree of foreclosure, upon the authority of *Slade v. Rigg*, 3 Hare, 35, a case in point. In that case there was a mortgage of a reversionary interest in stock, and it was contended that it did not admit of foreclosure, the right being merely equitable; but, in analogy to the common practice of a second mortgagee foreclosing the mortgagor without redeeming the first mortgage, the argument did not prevail.

Freeling, for the representatives of the second mortgagee, said, that the decision in *Slade v. Rigg*, ubi sup., was contrary to the practice as laid down in the previous authorities. *Ponten v. Page*, before Plumer, V. C., November 7, 1816; 1 Mad. Ch. Prac. 664, 3d ed. *Duncan v. Chamberlayne*, 11 Sim. 123 — V. C. E., April 30 and July 24, 1841, not reported on the form of the decree; Seton Dec. 183. It was opposed also to what Wigram, V. C., himself had said in *Dyson v. Morris*, 1 Hare, 422, s. c. 6 Jur. 297. In that case the court observed as follows: "There can, I apprehend, be no doubt that in the case of a mortgage of stock, and in the case of a mortgage of personal chattels, the remedy of the mortgagee would be by sale." In the case of *Slade v. Rigg*, ubi sup., the court, after referring to the decree in *Kemp v. Westbrooke*, as given in Seton Dec. 181, 182, which contained the ordinary direction, that in default of payment the bill was to stand dismissed, observed, that this operated as a foreclosure, and inferred that in the converse case of a bill for foreclosure there ought

¹ 15 Jur. 506.

Wayne v. Hanham & others.

to be a decree. This, however, would not necessarily follow, for in the case of a suit for redemption, the decree would necessarily be as in *Kemp v. Westbrooke*, for the defendant would have a right to insist on payment. In the case of a mortgage of real estate, the mortgagee was unable to sell; but in the case of a mortgage of stock or chattels, it had been held, that, without any power of sale being given by the security, the mortgagee, on default in payment of his money, might realize his security by sale. *Tucker v. Wilson*, 1 P. Wms. 261; s. c. 1 Bro. P. C. 494. *Lockwood v. Ewer*, 2 Atk. 303. *Kemp v. Westbrook*, 1 Ves. sen. 278; Bell's Sup. to Ves. sen. 149. There was a material difference between the cases of stock and of real estate. In the case of real estate, the only remedy was by foreclosure, which had been adopted probably from the inability of the court to direct a sale. Whether that was or was not the reason of the distinction, certain it was that, until *Slade v. Rigg* was decided, it had been the uniform practice to direct a sale in the case of a mortgage of stock and chattels.

Hetherington, for the mortgagor.

June 3, 1851. SIR GEORGE TURNER, V. C. The question in this case is, What is the proper form of decree on a bill for foreclosure by a mortgagee of reversionary interest in a sum of stock — whether on default of payment the decree should direct foreclosure or sale? The plaintiff, the first mortgagee, desires a decree of foreclosure; the defendants, the mortgagor and a second mortgagee, insist upon a decree for sale. In the case of *Ponten v. Page*, which was the case of a mortgage of a reversionary interest in stock, the decree was for a sale in default of payment. I have been furnished with a copy of that decree, and it directs the accounts to be taken, and, in default of payment, a sale, reserving further directions and costs; but, in *Slade v. Rigg*, 3 Hare, 35, Wigram, V. C., held, that a mortgagee of a reversionary interest in stock was entitled to the common decree for foreclosure in default of payment. There is no inconsistency between these decisions. It does not appear that the decree in *Ponten v. Page* was made adversely to the plaintiff, the mortgagee. Whether it was so or not, I am of opinion, that the proper form of decree is that which was adopted in *Slade v. Rigg*. No doubt, in such a mortgage, as well as in every other, the mortgagor has a right to redeem. The purpose of a decree of foreclosure is to exclude that right, and unless by the established rule of practice of the court the proper mode of excluding that right is by directing a sale, I think it must be excluded, according to the ordinary method of the court, by foreclosure. The mortgagee may, in such cases, and in some others, be entitled to a sale; but I do not find any rule or practice of the court which compels him to submit to it. On the contrary, in those cases in which a decree for sale is made at the instance of the mortgagee, the sale seems to depend more on the will of the mortgagee than on the right of the mortgagor. A remarkable example of this occurs in the Irish cases, where, although in suits for foreclosure the decree is uniformly for a sale, it is held that the mortgagor cannot maintain a bill for a sale, but only for

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redemption, as in *Drew v. O'Hara*, 2 Ball & B. 562, note *b*, and *M'Donough v. Shewbridge*, Id. 555. I fully concur in the observations of Wigram, V. C., as to what justice in such cases requires. I think there must be the common decree for an account, and for foreclosure.

In re THE DIRECT EXETER, PLYMOUTH, AND DEVONPORT RAILWAY COMPANY; ex parte BESLY.¹

March 12, 13, 14 and 15, and May 29, 1851.

Practice — Second Rehearing — Winding-up Acts — Contributory — Provisional Committee-man.

Leave to move for a second rehearing by the great seal may be applied for *ex parte*, and without notice.

The Winding-up Acts do not limit the time within which notice must be given of motion for a second rehearing by the great seal.

A second rehearing allowed under special circumstances, and Lord Cottenham's judgment reversed.

The mere fact of a person consenting to be nominated a member of a provisional committee does not authorize the committee to pledge his credit.

B. consented to be nominated a provisional committee-man of a projected company, upon an assurance that he would incur no liability, and would not be bound to take any shares; and he was nominated accordingly. By a letter to the secretary he afterwards declined to take up shares, and requested that his name might be taken from the list. The letter was laid before the managing committee, who resolved that the secretary should be instructed to inform B. that his wish should be complied with. This resolution was not communicated to B. After the scheme had been abandoned, B., in ignorance of the resolution, attended meetings, at which it was agreed to pay certain sums, and afterwards paid them, but upon the faith that no further claim would be made upon him:—

Held, that B.'s conduct prior to the abandonment did not render him liable to the creditors of the concern, or to contribute to the indemnity of those who were liable to the creditors; that the partial payments made by him after the scheme had been abandoned did not create a liability to make further payments; and that he was not properly on the list of contributories.

Quære, whether an undertaking, in which no person became bound to take any shares, and no shares were allotted until after the undertaking had been abandoned, is within the Winding-up Act, 1849.

THE master had ordered W. H. Besly to be retained on the list of contributories as a contributory to the above-named company. By an order, dated the 30th of May, 1850, upon motion on behalf of Besly, Knight Bruce, V. C., ordered his name to be removed from the list. By an order, dated the 5th of June, 1850, upon motion on behalf of the official manager, Lord Cottenham, C., directed the order of Knight Bruce, V. C., to be reversed, and the costs of the application to the vice chancellor to be paid by Besly. On the 31st of July following, Lord Truro, C., upon an *ex parte* application on behalf of Besly, gave special leave for the present motion, which was for a

¹ 15 Jur. 523.

In re The Direct Exeter, Plymouth, &c., Railway Company; ex parte Besly.

declaration that Besly was not a contributory, and for an order to remove his name from the list, and for payment to Besly of his costs of the application to Knight Bruce, V. C., and repayment of the costs paid by him to the official manager, in pursuance of the order of the 5th of June, 1850, and, if necessary, for a discharge of the order of the 5th of June.

The facts constituting the merits of this case, which has been already reported, 14 Jur. 704, are stated in the judgment below.

Roxburgh, for the official manager, objected *in limine* to the rehearing. The petitioners are out of time, and they are out of order. The order appealed from was made on the 5th of June, and this notice of motion was not given till the 31st of July. But by the 12 & 13 Vict. c. 108, s. 33, which received a judicial interpretation in *Sanderson's Case*, 3 De G. & S. 66, no notice of motion for a rehearing before the lord chancellor can be given after the expiration of three weeks after the order complained of has been made. They are also out of order. This is an application for a second rehearing, which cannot be had except by leave previously granted upon a special application. *Byfield v. Provis*, 3 My. & C. 437. A special application cannot be made *ex parte*, except by express rules, which are here inapplicable; it can only be made upon special petition, with notice, upon which the respondents may be heard. *Mousley v. Carr*, 3 My. & K. 205. *Deerhurst v. The Duke of St. Alban's*, 2 Russ. & M. 702. A common petition is irregular, and would be taken off the file, and any order made upon it would be liable to be discharged, as in *Moss v. Baldock*, 1 Ph. 118. See also *Berry v. The Attorney General*, 2 Mac. & G. 16. Had there been notice here, the leave of the 31st of July would not have been obtained. That leave was granted upon an allegation by counsel that the case stood upon the same grounds as *Ex parte Roberts*, 2 Mac. & G. 196; s. c. 14 Jur. 655, and *Ex parte Cottle*, 2 Mac. & G. 185; s. c. 14 Jur. 655, which the House of Lords in the latter case, and the Lords Commissioners in the former, expressly deny. The act has provided that a motion shall be applicable, instead of a petition; but sect. 118 provides that the general practice of the courts is to be followed where not varied under the act. It follows, that if notice would have been necessary upon petition, it is necessary also upon motion. The appeal (if any) should be to the House of Lords. *Fuller v. Willis*, 11 Jur. 233.

Rolt and *Karslake*, in support of the motion. The motion was reheard by Lord Cottenham within the three weeks limited by the act, and this is a continuation of those proceedings. The act affords no clew for ascertaining the limits of time within which an order of the lord chancellor may be reheard; only as regards orders by a vice chancellor or the master of the rolls is there a limitation. This is a motion, not a petition of appeal, and the cases cited do not apply. In *Mousley v. Carr* it was admitted, that the rule excluding a right to a second rehearing did not apply to motions; and if we are not entitled as of right, it is at least in the discretion of the court, as in

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Fournier v. Paine, 3 My. & K. 207, to grant a rehearing. The cases do not decide that notice must be given, but only that a special case must be made; and here a special case has been made. The court, upon the allegation of counsel that this was the same as *Ex parte Roberts* and *Ex parte Cottle*, gave leave to have the question discussed, whether there exist special circumstances to warrant a rehearing; and we are here to show such circumstances. The official manager should have moved for leave to strike the case out of the paper, as irregularly entered upon leave improvidently granted.

Roxburgh, in reply.

LORD CHANCELLOR. Before turning the parties round upon the alleged ground of a previous irregularity, I ought to have an express authority that they were wrong in applying for leave *ex parte*. I have made inquiry, and I have been informed by the registrars that there is no practice requiring a special petition to be presented for leave to set down a cause for a second rehearing. I also directed a search to be made on the subject, and I have been furnished by the registrar with a copy of the order in *Howel v. Howel*, mentioned in 1 Dick. 426, from which it appears that the petition in that case was *ex parte*; and it has not been shown that this practice has been departed from. It seems to me that a "special application" means no more than an application for the special purpose, and I am not satisfied that any notice was necessary. I find no authority which makes it necessary; and that being so, I see no reason, so far as the expediency of the practice is concerned, for making a new rule on the subject. The other objection is, that the application was not made within the time limited by the 118th section. No doubt expedition was one great object of the legislature, and without it, from the multitude of individuals concerned, no winding up would be possible. Accordingly, the act 12 & 13 Vict. c. 108, s. 33, provides that no notice of motion for rehearing a matter, which has been disposed of by a vice chancellor or the master of the rolls, is to be given after three weeks from the time the order is made. But here the appeal from the vice chancellor to Lord Cottenham was made within the twenty-one days; and what they now apply for is a rehearing of the motion before Lord Cottenham. How far does the act apply to this? It specifies no express limitation of time within which such a rehearing may be had. But then, what will be the practical effect of supposing that no limit is implied by the act? There would be no end to the mischief that would ensue; and it will be proper to make a general order to supply this deficiency.

Rolt and *Karslake* were now heard upon the question whether there existed special circumstances which made the motion a fit case for a second rehearing, (involving incidentally the merits.) This scheme never was matured into a company; only the master, having been ordered to wind up its affairs, held himself bound to assume its existence as a company. But, admitting it to have been a company, Besly never acted, or concurred in, or had notice of, any act of the

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other members of the committee, so as to pledge his credit. On this, *Roberts's Case* and *Cottle's Case*, affirmed by the House of Lords, 2 H. L. C. 637; 14 Jur. 703; 1 Eng. Rep. 9, are precisely in point. The judgment of the House of Lords was pronounced after we applied for leave to give this notice of motion, but the principle was contained in *Roberts's Case*. This is a stronger case than that of *Maudslay and Field*, 17 Sim. 157; s. c. 14 Jur. 1012; 1 Eng. Rep. 61, for Besly had not paid any deposits. It is stronger than *Carmichael's Case*, 17 Sim. 163; s. c. 14 Jur. 1014; 1 Eng. Rep. 66, for Besly never agreed, but expressly declined, to accept shares. The 76th section of the act of 1848 provides that the amount of the interest, for which any person is included in the list of contributories, is to be specified. Some interest, therefore, in the company, must be proved against Besly. By the 83d section the master's power to make calls on contributories is limited by the words, "but so far only as such contributories respectively shall be liable, at law or in equity, to pay the same." It was never intended by the act to create a new liability.

Roxburgh. *Roberts's Case* was expressly stated by the lords commissioners to be free from the specialties on which Lord Cottenham founded his decision in this case. *Ex parte Cottle* was the case of a mere provisional committee-man who had never acted, (Mr. Besly did,) and is expressly distinguished from the present by Lord Brougham. In the court below, Knight Bruce, V. C., made every thing turn on whether this provisional committee was identical with the company, and admitted that, if it were, Besly would be liable. Now, the committee was the company. If this was not a company, the order for winding up its affairs was irregular. But the House of Lords has recognized that order as regular; therefore this is a company. The House of Lords, in effect, declared this to be a company; they could not have meant the managing committee, which consisted of less than the seven members required by the act; they had regard to the provisional committee. In this light the judgment of the vice chancellor, as well as that of Lord Cottenham, decides that the master was right. Every case cited before the lords commissioners in *Roberts's Case* was cited to Lord Cottenham in this case, yet he held Besly liable. If that decision was wrong, the House of Lords was open to Besly on appeal; and on the principle of *Fuller v. Willis* this motion for a second rehearing by the great seal should be refused.

LORD CHANCELLOR. I cannot refuse to hear this case on the mere ground that the parties may go to the House of Lords. Lord Cottenham's decision was influenced by the view he took of the consequences of Mr. Besly being a provisional committee-man. It is true, he proceeded to say there were other circumstances in the case, and referred, amongst others, to the payments made by Mr. Besly. But Lord Cottenham gives his view of the consequences of being a provisional committee-man, and that view shows he considered the fact of Besly being a provisional committee-man very important, and as of itself involving liability. That is important, and I am not at liberty

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to say how far it influenced his lordship's judgment. His lordship's view of the consequences of being a provisional committee-man is contrary to the decisions in the cases which have been cited; and I think this is a sufficient reason why I should rehear the case on the merits.

Roxburgh. This company, being provisionally registered, was within the act; *Ex parte Barber*, 1 Mac. & G. 176; s. c. 13 Jur. 395; *Ex parte Matthews*, 16 Law T. 265; otherwise, the order for winding up its affairs, which was recognized by Lord Cottenham and the House of Lords, was irregular. Besly consented to become a provisional committee-man; he acquiesced in and adopted all the proceedings of the committee; he admitted his liability by making payments. He would have been entitled, therefore, to have the affairs of the company wound up. *Ex parte Hollingsworth*, 3 De G. & S. 7. *Ex parte Cooke*, Id. 148. He acquiesced in the company using his name as a provisional committee-man, when he might have had an injunction to restrain them. He acquiesced in the publication of a prospectus, to which his name was annexed, and which published the result of the engineer's survey. This brings him within the exceptional case put by Pollock, C. B., in *Reynell v. Lewis*, 15 M. & W. 517; and it was competent to the master to direct an issue, whether the effect of that publication was not to constitute the acting members Besly's agents. The doctrine, that, by agreeing to be a member of a provisional committee, a party gives no authority to the acting members to pledge his credit, has been overruled in *Hutton v. Upfill*, 2 H. L. C. 674; 1 Eng. Rep. 13, the effect of which is, that *Reynell v. Lewis* and *Wyld v. Hopkins*, 15 M. & W. 517, are no longer law; and it is only reasonable, that if one member of a provisional committee gives all the orders and pays all the liabilities, he should have a right, as against the others, to contribution.

Karslake, in reply. The payments were made under a mistaken impression of the liability of provisional committee-men, and will not of themselves create a liability. *Newton v. Belcher*, 13 Jur. 253. Besly had no notice of the publication of the alleged prospectus; nor did his attendance at the meetings, which were held after the affair was abandoned, render him liable.

[*Lord Chancellor.* Those meetings are not shown to have taken place with the view of carrying on the scheme, or contracting liabilities. They may have taken place with the view of ascertaining how the members were to relieve themselves from the liability with which they were threatened by the opinion of counsel. The parties may have attended, and appear to have attended, not as provisional committee-men, but as persons who had been such, and wished to relieve themselves. It must not be assumed that the meetings were acts creating liability.]

May 29, 1851. The LORD CHANCELLOR now delivered judgment. This case comes before the court on a rehearing of an appeal from the judgment of Knight Bruce, V. C., who had overruled a decision of

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Master Horne, by which William Henry Besly was retained on the list of contributories as a contributory to the Direct Exeter, Plymouth, and Devonport Railway Company. The judgment of Knight Bruce, V. C., declared that Mr. Besly was not a contributory, and directed that his name should be removed from the list of contributories. From this decision there was an appeal to Lord Chancellor Cottenham, who reversed the judgment of Knight Bruce, V. C., and confirmed the master's certificate, placing Mr. Besly on the list of contributories. There was afterwards an endeavor to obtain a rehearing before the lords commissioners, but it failed; a preliminary objection was taken. The lords commissioners decided that a rehearing was not a matter of course, and the case was disposed of, (not on the merits, but on some preliminary objection.) On a subsequent application to me for a rehearing, I thought, for reasons which I then stated, that a decision of the lords commissioners, and another of Lord Brougham in the House of Lords, had thrown some doubt on the decision in this case, and that the cause ought to be reheard on the merits. The appeal was accordingly reheard on the 13th, 14th, and 15th of March. In considering the question, whether Mr. Besly was rightly placed on the list of contributories to the payment of the debts contracted by the persons engaged in the endeavor to establish the projected company, it is proper to ascertain the grounds upon which Mr. Besly *would* become legally or equitably liable to be placed on such list; and these grounds are, either that he was liable to the creditors of the projected company, or that he was liable to contribute to the indemnity of those persons who were liable to the creditors of the projected company. Mr. Besly might become liable to the creditors by having personally contracted with them, or by his having given authority to those who did contract with the creditors to pledge his credit. He could in no other way become subject to any liability to the creditors. The liability to contribute towards the indemnity of those persons who did incur a liability to the creditors must also result from a contract with them, express or implied from his conduct. In this case the determination must depend upon the application of principles perfectly recognized in the courts of law and equity. The facts are known, subject to no doubt or dispute, and are stated, as it were, on the record; and I repeat, the liability must be decided by the application of the principles before mentioned to the facts so stated. In many cases of this description the entire conduct of the person whose liability is to be determined is not known; certain parts of it only are in proof, and the tribunal, whether it be a court or a jury, which has to determine the question, is compelled to infer, from such parts of the conduct as may be in proof, what other conduct or acts may have occurred affecting the question of liability; but where, as in this case, the whole conduct of the party is stated upon the record, all grounds for speculative inferences are excluded.

The liability of Mr. Besly to the creditors must depend upon the facts which occurred *before* the debts were contracted, and those facts are, that Mr. Besly, on some day prior to the 7th of October, consented to become a provisional committee-man; that on the 7th of October the persons, or some of them, who had also consented to

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become provisional committee-men, nominated Mr. Besly as one of that body. On the 6th of November, Mr. Besly wrote to the provisional committee, desiring his name to be withdrawn from the committee, and declining to take any shares in the projected company. On the 7th of November, Mr. Besly's letter was laid before the managing committee, who acceded to his request of withdrawal from the committee, and directed the secretary to inform Mr. Besly accordingly. On the 31st of December, the committee of management pronounced, in effect, that it was impracticable to establish the proposed company, and the project was abandoned, various debts having been contracted in the course of the measures which had been pursued in the endeavor to establish the company, and in the preparations for making the necessary applications to Parliament. Mr. Besly, up to this time, had not attended any meeting whatever, nor had any communication taken place between Mr. Besly and any person connected with the company, beyond what has been before stated. The only personal acts of Mr. Besly, therefore, are, that before any meeting had been held with a view to establish the company, he consented to be nominated a provisional committee-man, and he was so nominated accordingly; and that afterwards, on the 6th of November, he desired his name to be withdrawn, and declined all connection with the projected company. The only ground, therefore, upon which Mr. Besly could become liable to the creditors, must be, that these acts, *by operation of law*, gave authority to those who contracted with the creditors to pledge Mr. Besly's credit by such contracts.

The question of Mr. Besly's liability to contribute towards the indemnity of those who *did* contract with the creditors must also depend upon the legal operation of the same facts, coupled with the fact of certain payments made by him after the project was abandoned, for the purpose of such payments forming part of a fund to be applied in satisfying the creditors. In determining upon Mr. Besly's liability to contribute to such indemnity, it may become necessary to consider the legal effect of his conduct before the project was abandoned, independently of what occurred after such abandonment, and also in connection with his conduct after such abandonment. I have stated the general result of the evidence upon which the master decided Mr. Besly to be a contributory. The detail is as follows: In the month of September, 1845, Major D'Urban, Mr. Flood, a lieutenant in the navy, and Mr. Curling, a merchant, conceived the project of constructing a direct railway to Exeter, and on the 19th of September they registered themselves as the promoters of such a scheme, calling it "The Direct Exeter, Plymouth, and Devonport Railway Company;" and on the 29th of September following, a paper, entitled "Preliminary Prospectus," containing a list of forty-three names, called "provisional directors," was registered, which does not mention Besly's name. In that document application for shares was directed to be made to a provisional committee of management. The "Preliminary Prospectus" contains no statement that at that time there were any subscribers to the undertaking;

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the statement purports to be made by the promoters only. No subsequent paper or document of any kind was registered.

In October, Mr. Besly was solicited by Captain Berkeley (whose name was in the list of the provisional directors) to become a member of the provisional committee. Mr. Besly was then told by Captain Berkeley, that he would incur no liability, and would not be bound to take any shares. Mr. Besly verbally consented to become a member of the provisional committee. The first minute or entry in any book of the company is under date the 4th of October, 1845, and is entitled "Provisional Committee Resolutions," and it states — "At a meeting of the Direct Exeter, Plymouth, and Devonport Railway Company, at the offices, Bedford Circus, Exeter, present the mayor, (chairman,") and twenty-two other persons *named*, including Captain Berkeley, "the committee were of opinion that the whole of the members of the provisional committee should be summoned to attend a meeting on Tuesday then next, (the 7th of October,) for the purpose of appointing a committee of management, secretary, and officers, and that Mr. Besly and a Mr. Davis should be added to the provisional committee." There is no evidence showing *when* Mr. Besly had notice of his appointment as a member of the provisional committee. He never attended any meeting whatever until after the scheme was abandoned; nor is there any evidence of any communication between Mr. Besly and either the provisional committee or the managing committee, except the letter to be mentioned presently. On the 7th of October, 1845, there was a meeting of the provisional committee, to appoint a managing committee; Mr. Besly was not present at that meeting, nor was he appointed one of the managing committee. Immediately after their appointment, the managing committee took upon themselves the entire direction of the concern or scheme. They issued prospectuses, received applications for shares, employed engineers to make surveys, plans, and sections, and incurred considerable expenses incidental to such an undertaking. On the 6th of November, Mr. Besly wrote the following letter to the secretary: —

"47 Southernhay, November 6, 1845.

"Sir, — I find it will not be quite convenient for me to take up the shares *which are allotted to me as one of the provisional committee* for the Direct Exeter, Plymouth, and Devonport Railway; I must, therefore, request that my name be taken from the list; and I give you this early intimation, that I may be no obstacle to the shares being allotted to another person.

"I am, sir, your obedient servant,

"WM. HY. BESLY."

There was no direct evidence of the contents of the letter to which this was an answer; but in the minutes of the proceedings of the managing committee there is a resolution, under date of the 27th of October, that a letter should be addressed to the members of the provisional committee to the following purport: —

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"Direct Exeter, Plymouth, and Devonport Railway Company.

"5 Bedford Circus, Exeter, October 30, 1845.

"Sir, — I beg to acquaint you that your application for the number of shares you wish to have allotted to you (as a member of the provisional committee) in the above undertaking should be made on or before the 5th of November next; and in that case a preference will be given to your request.

"By order of the committee of management,

"F. G. FARRAND, Sec. *pro tem*"

At the date of Mr. Besly's letter there had not been any allotment of shares. Mr. Besly's letter of the 6th of November, 1845, was laid before the managing committee, at a meeting on the following day, (the 7th of November,) when they resolved that the secretary should be instructed to inform Mr. Besly that his wish should be complied with. From this time Mr. Besly had no communication with the committee or their secretary, until the 31st of December, before which day the undertaking was virtually abandoned. On the 31st of December, Mr. Besly attended a meeting in consequence of some letter, the contents of which do not appear. An account of this meeting is contained in the book of the provisional committee, and the entry is entitled, "At a meeting of the provisional committee, held this 31st of December, 1845." Then follow the names of seventeen persons who had been nominated provisional committee-men, Mr. Besly's name being among them. At this meeting a report of the managing committee was read, which stated that the allottees had failed to pay their deposits; that debts had been contracted beyond the funds at the disposal of the committee, and that the scheme was abandoned; that the opinion of counsel had been taken, to the effect that the provisional committee were liable, collectively and individually, for all the debts of the company, and the allottees were liable to the committee for the amount of their deposits. The entry states that the report was received, approved, and adopted, and the meeting resolved, that it appeared from counsel's opinion that the whole of the provisional committee were collectively and individually liable for the debts of the company; that the committee having agreed to pay 3s. per share on 200 shares each, the provisional committee do pay the like amount per share on 100 shares each, to meet the liabilities of the company; that a committee of four persons be appointed to coöperate with the managing committee, to prepare the accounts for inspection at the next meeting. Mr. Besly states, in an affidavit which was before the master, in substance, that he was not present at the meeting of the 31st of December, 1845, until all the resolutions of that meeting had been passed, and that he would not then have attended if he had been informed that his resignation had been accepted; and there is no evidence to the contrary. Mr. Besly subsequently paid 15*l.*, being 3s. per share as on 100 shares. On the 19th of January, 1846, an agreement was signed by twenty-six gentlemen named on the provisional committee, of whom Mr. Besly was one, to the following effect: "We, the said several persons, parties

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hereto, shall and will pay and bear an equal part and proportion of all debts, damages, and costs which the said several persons, parties hereto, any or either of them, shall be compelled to pay, for or on account of or incident to the said proposed railway: provided always, and it is hereby expressly agreed, by and between all and every and each of the said several persons, that no one person party hereto shall be liable to pay or contribute a larger sum, under this agreement, than 100*l.* sterling. As witness," &c. It is to be observed, that this agreement expressly limits the liability which it professed to create to 100*l.*; and the liability, such as it is, is confined altogether to the parties thereto.

At a meeting of the provisional committee on the 2d of March, 1846, at which Mr. Besly was not present, it was resolved, that the members of the provisional committee should each pay 65*l.*, including the former 15*l.* Mr. Besly, on the 26th of March, 1846, paid the further sum of 50*l.* These sums were inadequate to satisfy the claims of the creditors, and a meeting of certain persons who had been on the provisional committee took place on the 21st of August, 1846, at which meeting Mr. Besly was not present. At that meeting it was resolved, that the members of the provisional committee should be called upon to pay a further sum of 50*l.*, making in the whole 115*l.*, and the meeting adjourned to the 31st of August, on which day another similar meeting took place, at which meeting Mr. Besly was present, when it was resolved, that the members present would make up their payments to the amount of 115*l.*, and, so far as they could, resist any further demand upon them. Mr. Besly subsequently paid the further sum of 50*l.*, which two sums of 50*l.* each made up the 100*l.* agreed to be paid by the memorandum of the said 19th of January, 1846. The creditors not being paid, one of them brought an action against Colonel Ellis, one of the persons named as a provisional director in the original preliminary prospectus. Colonel Ellis applied to this court under the Winding-up Acts, when the usual reference was made to the master, by an order dated the 8th of June, 1849. The official manager inserted Mr. Besly's name in the list of contributories, to which that gentleman objected; and the matter was heard before Master Horne, who decided that Mr. Besly was a contributory. His certificate refers to the evidence before him, and the question is, whether, upon the facts of the case appearing in that evidence, Mr. Besly is or is not to be deemed a contributory. On the argument before the vice chancellor it was contended, that there was no company in this case within the Winding-up Acts, and if there were, Mr. Besly was not a contributory. Knight Bruce, V. C., seems to have entertained no doubt that Mr. Besly was not a contributory, and he appears not to have been quite satisfied, though he gave no judgment on the point, that there was any company falling within the provisions of the Winding-up Acts. Lord Cottenham, on the other hand, "would not entertain the idea" that the company had not advanced to that state which made it the proper subject of an order under the Winding-up Acts, and he overruled the vice chancellor's judgment on the other point, and held, that Mr. Besly was

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properly on the list as a contributory. The conclusion to which I have come on the question, whether, if there be a company, Mr. Besly ought to be included in the list of contributories, makes it unnecessary for me to give any opinion on the question, whether any company or association was or was not formed within the meaning of the Winding-up Acts. The last statute on the subject, the 12 & 13 Vict. c. 108, has certainly used very large and general terms, and has made the provisions apply to "all partnerships, associations, and companies, whereof the partners or associates are not less than seven in number, whether incorporated or unincorporated," (with an exception not applicable to the present case.) But notwithstanding the generality of the terms above, I think it might be difficult to say of whom this association or company consisted, as no person ever became bound to take any shares, and no shares were, in fact, ever allotted, until after the scheme had been abandoned, when, as might have been expected, no one, or at most very few, of the allottees would accept shares; and an objection appears to have been urged, that, in truth, the whole matter resolved itself into an attempt to form a company or association, which utterly failed. On the other point, I cannot help thinking that the facts of the case were not accurately and correctly presented to the mind of Lord Cottenham. According to the report of his judgment, it would seem as if it had been represented to him that Mr. Besly had attended meetings of the provisional committee before the provisional committee appointed the managing committee, which might have made, though I do not say that it would have made, some difference; and it might have been urged, that, by appointing a managing committee to prosecute the scheme, and incur all the expenses incidental to it, he became liable to contribute to the payment of such expenses. *But this was not the fact.* Mr. Besly never did attend any meeting of any committee till all the expenses had been incurred, and in the mean time he had desired his name to be withdrawn, which desire the committee expressed their intention to comply with. As I have before stated, if Mr. Besly is to be considered as a contributory, it must be either because he became liable to the creditors, or liable to indemnify those who are liable to the creditors. Now, a liability to the creditors could only arise from some contract, either express or implied — either some express contract which directly binds him, or some contract to be implied from his conduct; and, in like manner, he could be only subject to a liability to indemnify those who were liable to the creditors by reason of some contract with them, which also may be either express or implied. But I am unable to discover the grounds upon which liability attached to Mr. Besly in either the respects I have mentioned. Mr. Besly never attended any meeting of any sort until after the whole scheme was abandoned, and consequently not until after all the expenses had been incurred. There are no facts which occurred before the debts were contracted from which any liability could attach to Mr. Besly, except that he consented to his name being added to the committee; but I think that fact, standing alone, conferred no authority on the committee to

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contract upon his credit; and with the creditors themselves he had no communication whatever. There is no evidence that Mr. Besly had notice of any prospectus being published containing his name, still less that he ever authorized any such publication. No prospectus ought to have been published without being registered, and no such prospectus was registered. There is, therefore, no ground upon which Mr. Besly could have been rendered liable in an action at the suit of any creditor. The non-liability to the creditors, under those circumstances, is distinctly laid down in the judgment of the Court of Exchequer, as delivered by the lord chief baron, in the cases of *Reynell v. Lewis*, and *Wylde v. Hopkins*, 15 M. & W. 517, and adopted in this court in *Ex parte Cottle*, 2 Mac. & G. 185, and also adopted in the House of Lords, 14 Jur. 703; s. c. 1 Eng. Rep. 9. Mr. Besly, therefore, if not liable to the creditors, can be a contributory only by some contract, express or implied, between him and the committee. But Mr. Besly's conduct before the debts were contracted being limited to his consenting to his name being on the committee, and it being at that time uncertain whether any company would ever be established, or, if established, whether they would prosecute the concern, which, as I have already stated, gave no authority to the committee to contract on his credit, I am not aware of any principle of law or equity which made such consent operate as a contract with them to contribute to indemnify them in respect of debts contracted by themselves. It does not appear that he knew how many persons composed the committee; he had never professed any intention to take shares; and when it was proposed to him to do so, he immediately declined.

Such is the state of facts before the concern was abandoned; and if up to that time no liability to the creditors attached to Mr. Besly, nor any liability to contribute to indemnify the committee, his liability (if any) must result from his conduct subsequent to the abandonment of the concern. And here I must repeat, that if the evidence did not disclose what the conduct of Mr. Besly had been before the debts were contracted, his subsequent conduct might lead to an inference (in the absence of evidence to the contrary) that he had so conducted himself as to be liable. But with the knowledge the court has, that no such conduct had been pursued, the subsequent facts can create a liability only from their legal effect. If Mr. Besly was liable neither to the creditors nor to the committee before the concern was abandoned, upon what consideration was he bound either to pay the debts, or to contribute to indemnify the committee? Or how will partial payments (even if made under a supposed liability which did not exist) create a liability to make further payments? The only facts subsequent to this are his attending the meetings at which it was agreed to pay certain sums, and afterwards actually paying them. The subsequent payments of three sums of 15*l.*, 50*l.*, and 50*l.*, are the principal grounds relied upon as establishing Mr. Besly's liability; but I think it clearly appears that these payments were made in ignorance of the fact, that the committee of management had acquiesced in his application of the 6th of November, 1845, desiring that his name might be removed—a fact which the

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secretary ought to have communicated to him, but neglected to do. I think also that the observation made in the judgment of the lords commissioners in *Ex parte Roberts*, 2 Mac. & G. 196, that the payments were made *causa pacis*, applies to this case. If the payment of a small sum would put an end to litigation and further anxiety upon the subject, Mr. Besly was willing to make the payment; but he did not intend thereby to ratify all that had been done, and to make himself liable to an unlimited extent, not having been so liable before. Nor is that the legal result of these payments; they were always made upon the faith that no further claim should be made upon him; and I think there is an absence of all facts which could create a legal liability of Mr. Besly; and the facts which are stated, in my judgment, repel any inference from the payments, that he meant to admit, or that they operated as an admission of, an unlimited liability. On these grounds I think Mr. Besly is not properly on the list of contributories, and the order of Lord Cottenham placing him there must be discharged, which leaves the order of Knight Bruce, V. C., standing.

After a protracted discussion as to the form of the order, his lordship, being of opinion that the present rehearing was but a continuation of the appeal before Lord Cottenham, ordered *the appeal to be dismissed, with costs.*

*Ex parte PREECE; in re THE RUGBY, WARWICK, AND WORCESTER RAILWAY COMPANY.*¹

May 1, 1851.

Joint-stock Companies Winding-up Acts — Scripholders — Calls — Costs.

A company was ordered to be wound up. No debts had been established. The master allowed the claims of creditors as claims only. The master, in settling the list of contributories, divided the same into several classes, one of which was of scripholders, who, before the order for winding up, received back part of the original deposits from the directors, upon their shares being cancelled:—

Held, that the master had jurisdiction to make a call upon the contributories in respect of the costs of proceedings in and about the winding up of the affairs of the company, although there had been no taxation of them, or adjudication upon them by the court:—

Held, also, that the master was right in making a call for contribution from scripholders who had received back part of their deposits on the cancellation of their shares.

MASTER RICHARDS, the master charged with the winding up of the affairs of the Rugby, Warwick, and Worcester Railway Company, by an order or direction made on the 28th of March, 1851, included on the list, in a class of contributories No. 6, the names of Richard Matthias Preece and Thomas Henry Evans, jointly as "Messrs. Preece & Evans," and thereby ordered that a call of 4s. per share

¹ 15 Jur. 528.

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should be made upon all contributories in lists or classes 4 and 6, (being the contributories to whom the sum of 15s. per share was paid or returned,) and all such other contributories in lists or classes of contributories numbered 1 and 2 as were not included in the lists or classes 4 and 6, and who had neither transferred their shares, nor received or been paid 15s. per share; and thereby ordered, also, that each of such contributories, on or before Monday, the 28th of April, 1851, should pay to the official manager of the company, at his office, No. 4 Sambreok Court, Basinghall Street, in the city of London, such call of 4s. per share, on the balance (if any) which would be due from him, after debiting his account in the company's books with such call.

A motion was now made on behalf of those gentlemen, which sought the discharge of that order. The facts of the case were as follows, as appeared by the order and the proceedings in the master's office: The Rugby, Warwick, and Worcester Railway Company was projected in 1845, and in the following year it was abandoned. In June, 1846, the directors announced that they would return 15s. per share to the holders of scrip, upon their agreeing to the cancelling of their shares. The sum of 2l. 2s. per share had been paid by way of deposit upon the allotment of the shares. On the 1st of June, 1849, an order for winding up the company was made. The official manager carried into the master's office a list of contributories arranged in the following classes: No. 1, list of contributories, being shareholders who have paid deposit and signed deeds; No. 2, list of contributories, being shareholders who have paid deposit and not signed deeds; No. 3, list of allottees who have applied for shares, and to whom they have been allotted, but who have neither paid deposit nor signed deeds; No. 4, original allottees who had not parted with shares, and delivered them up on receiving 15s. per share from the directors; No. 5, original allottees who had not signed, but who received the 15s.; No. 6, transferees of shares, for which the original allottees have signed the deed; No. 7, transferees of shares, for which the original allottees have not signed the deed; No. 8, persons who have signed the deed, and not received back the 15s.; No. 9, persons who had not signed the deed, nor received back the 15s.; No. 10, provisional directors who have signed the deed and who paid the deposit; No. 11, provisional directors who have neither signed the deed nor paid the deposit. Messrs. Preece & Evans were stock-brokers, and entitled to 680 shares in the company, having purchased the scrip from persons who either were, or represented parties who were, original allottees; they were placed by the master in class No. 6. Classes No. 3 and No. 5 were disallowed by the master; and in class No. 7 no names were inserted. On the 28th of March, 1851, the master made a call of 4s. per share on classes No. 4 and No. 6. Nothing was stated in it as to the ground upon which the call was made, as it was in the form given in the schedule to the act of 1848. No debts had been established against the company, but the claims of creditors had been allowed by the master as claims only.

Ex parte Preece; in re The Rugby, Warwick, and Worcester Railway Company.

Russell and Field, in support of the motion, contended that the order ought to be discharged, as it had been made, not in respect of debts, for none had been established or allowed, but for the purpose of providing for costs, which costs had not been ascertained, and in respect of which no bill had been delivered or taxed. No person had been found liable to costs; and the 83d section of the Winding-up Act of 1848 provided, that the master should make calls on contributories, or classes of contributories, "so far only as such contributories respectively should be liable at law or in equity to pay the same." No scrip-holder could be liable, either at law or in equity, in respect of an inchoate company. These scrip-holders had surrendered their rights in the company upon receiving the 15s. per share, and they were not, therefore, parties on whom a call should be made. If, however, they were to be considered in any degree liable, the call was bad, as it was not made upon all the members or contributories, but only on those included in certain classes. The 103d and 104th sections of that act, and the 12th section of the Winding-up Act of 1849, did not authorize the course adopted, but merely enacted "that the costs of all proceedings which shall take place in and about the winding up, as to which the court shall have made no order, shall be in the discretion of the master, and it shall be lawful for the master to award a single sum or fee for any costs awarded by him, or otherwise to settle the principle and the scale of fees, upon or according to which such costs shall be ascertained and settled."

Swanston and *W. T. S. Daniel*, for the official manager, were not called on.

Knight Bruce, V. C. It is quite clear the master had jurisdiction to make this order, therefore it is only a question of discretion. Before I come to interfere with the discretion of the master, I must have a *prima facie* case made, showing that that discretion has been erroneously exercised. I mean erroneously in my judgment. I must think it erroneous, although it may really be very right. Now, no impression has been made upon my mind that the discretion of the master has been erroneously exercised. I am of opinion that it is not the intention of these acts of Parliament, or either of them, that the master should delay making a call for costs until there has been a taxation, or until the court has adjudicated upon the case. I am of opinion that it was within the jurisdiction of the master, viewing all the circumstances before him, and upon an estimate of all the facts within his knowledge, to make a call for costs. That call might be either improperly made at the time, or it might be made upon persons not liable. No ground whatever has been established for inducing me to hold that the call is too great in amount. Then, has it been made on improper grounds? It has been suggested that it was made upon improper persons, as to the two gentlemen who made this motion, for, having been only purchasers of scrip, they are not liable for debts in the same sense as members of the company—original members—were or would have been. I am not aware, however, of any such difference. They are placed generally by the

 Hunter's Case.

master on the list as contributories. When I add to these considerations the knowledge of the fact, that these two gentlemen have already received 15s. a share from the directors, in respect or by reason of 2l. 2s. per share paid by those who originally held the shares so now held by them, all difficulty vanishes from my mind entirely. This is an application which ought never to have been made, and I refuse it, with costs.¹

 HUNTER'S CASE.²

June 5, 1851.

Call — Costs.

Where no debts have been established against a contributory, though costs have been incurred in winding up, a call cannot be made on the contributory.

IN this case an order for winding up the affairs of the Direct Birmingham, Oxford, Reading, and Brighton Railway Company had been made, and the list of contributories had been settled, William Hunter being one of them. The official manager made an affidavit that there was due from him to his solicitor the sum of 1180l., costs incurred in winding up this company, and that there was due to him for his own costs, properly incurred, the sum of 700l., making together 1880l.; that a call of 12s. 6d. per share would not realize more than 800l.; and that that amount at the least ought to be raised towards the payment of the costs of winding up. On this statement the master made a call of 12s. 6d. per share on Hunter in respect of 100 shares. It did not appear that any debts or liabilities had been established against the concern. Hunter now moved that the order for a call on him might be discharged.

Rolt and *Shapter*, in support of the motion. It has not yet been shown that Mr. Hunter is liable for any debts whatever. As to the costs, they must be, at all events, taxed pursuant to the 105th section of the act, or awarded pursuant to the 12th section of the amended act. The 83d section only directs calls to be made on those who are liable to the debts. *Upfill's Case*, since reported, 15 Jur. 481; s. c. *ante*, p. 128.

Roxburgh opposed the motion, and cited the case of *The Rugby, Warwick, and Worcester Railway Company*, now reported, 15 Jur. 528; s. c. *ante*, p. 161, in which no debts had been proved, and a call for costs made; and *Knight Bruce, V. C.*, there decided, that the master was right, and that it was not the intention of the acts that he should delay his

¹ But see *Upfill's Case*, 15 Jur. 481; s. c. *ante*, p. 128, and *Hunter's Case*, in the *Direct Birmingham Railway Company*, 15 Jur. 532; s. c. *post*.

² 15 Jur. 532.

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discretion. The case of costs differed from debts, for the number of shares made no difference, it being a liability which was equal to all.

LORD CRANWORTH, V. C., said, that he was sorry for the official manager, that he could not help him. It appeared to his lordship a corollary from the other position, that before the master, in the exercise of his discretion, could make a call, he must ascertain the sum for which the call was made, and the costs which the parties were liable for; it did not follow that 800*l.* was the sum to which they were liable to contribute. It was doubtful whether any call for costs could be made until the debts for which each party was liable had been ascertained. The call was to be made so far as the contributor was liable at law or in equity. At law, strictly speaking, the costs would not be payable, but that was rather the result of the act. The master surely had no proper data whereon to exercise his discretion until he had ascertained the proportion. In these assemblages, erroneously called companies, the official manager undertook a most onerous duty. It was a problem, unsolvable by his lordship, why a man was liable for more in respect to one hundred shares than in respect to fifty. The master's order must be discharged; the official manager to have his costs out of the estate.

ASKEW v. MILLINGTON & others.¹

May 12, and 27, 1851.

Agreement to compromise a Suit— Cannot be enforced by interlocutory Application to stay Proceedings in the Suit.

The plaintiffs filed their bill against A and the executors of B, to charge A and the estate of B with the loss occasioned by a breach of trust on the part of A and B. After replication filed, the plaintiffs and A entered into an agreement to compromise the suit. On drawing up the agreement, the plaintiffs refused to complete, unless the representatives of B were joined as parties. A, on the other hand, insisted that it was no part of the understanding that they were to be parties, inasmuch as the estate of B had become the subject of a decree of the court in an administration suit. The plaintiffs then set down the cause for hearing; whereupon A presented a petition praying that the cause might not be heard, and that, in pursuance of the agreement for compromise, the bill might be dismissed.

The court dismissed the petition, with costs, holding, first, that it was wrong in point of form, the proper proceeding to enforce the agreement being by independent bill for specific performance, and not by interlocutory proceeding in the suit; and, secondly, that the agreement appeared to be one which the court could not enforce even on bill filed.

THIS was a petition presented by one of the defendants in the suit, praying that the cause, which it was stated had been set down for hearing in contravention of an alleged arrangement and compromise, might not be heard; and that, in pursuance of such alleged agree-

¹ 15 Jur. 532.

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ment and compromise, the bill might be dismissed without costs as against the petitioner, and with costs as against the other defendants, the petitioner being willing and thereby undertaking to perform the said agreement for compromise on his part in all respects. The bill was filed in December, 1848, against the petitioner and the executors of one James Chambers, deceased, alleging that Chambers and the petitioner were the trustees under certain indentures of covenant, whereby certain sums, amounting in all to 6000*l.*, were covenanted to be paid by one Benjamin Tidswell to the trustees, upon trusts, to the benefit of which the plaintiffs had become entitled; that by the neglect of the trustees in making a proper investment of the trust fund, a loss had been occasioned to the plaintiffs; and praying that such loss might be made good to the plaintiffs by the petitioner and the estate of Chambers. After the defendants had appeared and answered, and replication had been filed, a treaty was commenced between the plaintiffs and the petitioner for a compromise of the suit. To this treaty the other defendants were not parties, those defendants having instituted a suit, *Gratrix v. W. Chambers*, for administration of their testator's estate, in which a decree for the usual accounts had been made. The treaty above mentioned broke off early in July, 1850, but was almost immediately renewed, and on the 19th of July, it was arranged that Mr. Charlewood, of the firm of Cunliffe, Charlewood, & Co., as the solicitor and agent of the petitioner, should submit to the plaintiffs fresh proposals for terminating the suit. Accordingly, on the 23d of July, Charlewood, as the solicitor and duly authorized agent of the petitioner, left with Mr. Faulkner, the solicitor and agent of the plaintiffs, proposals for compromise of the suit, which were in the following terms: "Proposals by Mr. William Milnes Millington for settlement of the suit *Askew v. Millington & others*. That the bill be dismissed with costs; that Mr. Millington shall pay all the costs of the defendants; that the plaintiffs shall pay their own costs; that Mr. Millington shall pay to the plaintiffs the sum of 500*l.*; that Mr. Millington shall, at the plaintiffs' expense, take in a charge against the estate of Mr. James Chambers, in the suit *Gratrix v. Chambers*, in respect of the trust moneys and interest owing to the plaintiffs, and shall use his best exertions to substantiate the greatest claim that can legally be admitted; that from the first moneys to be received by the said William Milnes Millington from the estate of James Chambers, in respect of such proof, the said William Milnes Millington shall retain the sum of 500*l.* in repayment of the above sum of 500*l.*, and also interest thereon after the rate of 4*l.* per cent., and also the sum of 100*l.* in part payment of the costs of the defendants in the suit *Millington v. Askew*; that the said William Milnes Millington shall undertake that the plaintiffs shall receive the whole amount of the sum for which he may be allowed to prove as aforesaid against James Chambers's estate, (after deducting the said sum of 500*l.* and interest, and 100*l.* so to be retained as aforesaid,) from James Chambers's estate at the distribution thereof, and shall pay to the plaintiffs the deficiency; that no proceedings shall be taken against

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the said William Milnes Millington until the deficiency shall be ascertained; that the balance of trust moneys in Messrs. Loyd, Entwisle, & Co.'s bank, and moneys to be received from Tidswell's estate, shall belong to the plaintiffs, after deducting therefrom Messrs. Cunliffe & Co.'s accounts against them and their trustees, amounting to £—. These proposals submitted without prejudice in any way to Mr. William Milnes Millington, if not accepted." On the 2d of August, 1850, Faulkner, as solicitor and agent of the plaintiffs, wrote and sent to the said Messrs. Cunliffe, Charlewood, & Co., as the solicitors of the petitioner, a letter of that date, in the words and figures following:—

"104 King Street, Manchester, Aug. 2, 1850.

"Dear Sirs, — *Askew v. Millington & others*, — My clients will agree to your proposals for a settlement, with the exception of a deduction of 100*l.* on account of the defendants' costs. With a view, however, of meeting you, and ending litigation, I have prevailed upon them to consent to 50*l.* being deducted, in addition to the 500*l.* and interest, out of the moneys to be received by Mr. Millington from Chambers's estate, but beyond this they will not go. As they are already making great concessions, I hope your clients will at once consent that the necessary agreements may be drawn up. This letter is without prejudice.

"Yours truly,

"E. C. FAULKNER."

On the 13th of August, 1850, the Messrs. Cunliffe, Charlewood, & Co., as the solicitors of the petitioner, in reply to such last-mentioned letter, wrote and sent to Faulkner a letter of that date, in the words following:—

"Princes Street, 13th of August, 1850.

"Dear Sir, — *Millington & others v. Askew*, — We are glad to say that Mr. Millington consents to the modification of the terms of the proposals as expressed in your letter of the 2d instant. This suit may now, therefore, be considered as at an end. We will prepare and send you a draft agreement. The sum to be retained out of the balance in bank and any moneys from Tidswell's estate will be 21*l.* 8*s.* 4*d.*

"Yours, &c."

On the parties proceeding to draw up a draft agreement, embodying the terms of the proposed compromise, a difference arose as to whether the executors of Chambers should be parties to the agreement or not. It was insisted, on behalf of the plaintiffs, that the executors should be parties, and on behalf of the petitioner, that this was not intended, and that it could not be expected, having regard to the position of those executors with reference to their testator's estate, which had fallen entirely under the control of the court. The result was, that the parties being unable to come to terms, Faulkner, on the 26th of October, 1850, wrote and sent to Messrs. Cunliffe & Co. a letter, in the following terms:—

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" Manchester, Oct. 26, 1850.

" Gentlemen, — *Askew v. Millington*, — In reply to yours of the 22d instant, I shall only observe, as previously, that I always understood (and there is not any thing in your proposals to imply the contrary) that the executors of Chambers would be parties to carry out the compromise, and I have again to inform you that I shall not waive the point. My clients are willing to carry out their acceptance of your proposals for compromise in their true spirit; and I am advised that the executors of Chambers are, under your proposals, necessary parties to effect the arrangement. It is a matter of indifference to me whether you return me the draft agreement I have forwarded to you perused on behalf of the defendants, or send me one for perusal on behalf of the plaintiffs; but unless I receive one or the other within a week, I shall consider the negotiations again at an end, and proceed with the suit without further delay.

" I am, gentlemen, &c."

To this, Messrs. Cunliffe & Co., on behalf of the petitioner, replied by letter, dated the 30th of October, 1850, enclosing a draft agreement, stating that the petitioner would not swerve from his position, or consent to the executors of Chambers being made parties. In reply to this, Faulkner wrote and sent to Cunliffe & Co. the following letter: —

" 104 King Street, Manchester, Nov. 15, 1850.

" Gentlemen, — *Askew v. Millington & others*, — Having, in my last letter to you, distinctly stated that I could not consent to any agreement for compromise herein, unless the executors of Chambers were made parties, it is worse than useless you having sent me a draft agreement of compromise on behalf of your clients, accompanied with a letter from you stating — ' We beg of you most distinctly to understand that we shall not swerve from our position, and shall not consent to the executors of Chambers being made parties.' I return your agreement, and, need hardly add, shall, on behalf of my clients, proceed to prosecute this cause with all practicable despatch.

" Your obedient, &c."

The plaintiffs then set down the cause for hearing, whereupon the present petition was filed by the defendant Millington, setting forth the circumstances stated above, and insisting that the proposals for compromise of the 23d of July, coupled with the letters of the 2d and 13th of August, 1850, constituted a valid and binding agreement of compromise, and praying as above.

Bethell and *Renshaw*, in support of the petition, contended that the agreement was one which the court would enforce, and that, having control over the proceedings in the suit, it would carry the agreement into effect by staying such proceedings. *Rowe v. Wood*, 1 J. & W. 315. *Tebbutt v. Potter*, 4 Hare, 164. *Hardey v. Dartnell*, 13 Jur. 727.

Stuart and *Baggallay*, for the plaintiffs, argued that the agreement

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was too uncertain in its terms to be regarded; and that even if it were binding, it could not be enforced by interlocutory application to stay proceedings in the suit, but must be made the subject of an independent suit for specific performance. *Forsyth v. Manton*, 5 Mad. 78. *Wood v. Rowe*, 2 Bligh, 617.

E. Bury, for the executors of Chambers, was prepared to submit to such order as the court might make.

Bethell, in reply, proposed to take an order staying proceedings, upon an undertaking of the petitioner to file a cross bill, or a supplemental bill in the nature of a cross bill, to enforce the agreement, reserving the costs of the present application.

SIR GEORGE TURNER, V. C. The bill in this case in effect prays the specific performance of the alleged agreement for a compromise of the suit. On the petition being opened, it occurred to me that the specific performance of such an agreement could not possibly be ordered in the existing suit, but must be the subject of a further suit; and in support of this view of the case, *Forsyth v. Manton* and *Wood v. Rowe* were cited on the part of the respondents; but, on the other hand, the petitioner relied on the *dicta* in *Wood v. Rowe*, and on the decision in *Tebbutt v. Potter*. The course to be pursued in cases of this nature not appearing to be well settled by those authorities, I have searched for further cases on the subject, and have not found any others reported. I have found, however, a precedent of a bill drawn by the late lord chancellor in 1820, which goes far to show what is the proper course in that state of the proceedings. In that case the original suit was between partners for accounts of a partnership, and a decree had been made for the accounts. After the decree an agreement for a compromise was entered into, and the plaintiff in the original suit having refused to carry out the compromise, the bill in question was filed for a specific performance of the agreement, and for an injunction to restrain the original plaintiff from further proceeding in the suit. My recollection of the case enables me to add, that this course of proceeding was the result of a previous motion in the original suit to stay proceedings having been refused by the court. That case and the case of *Forsyth v. Manton*, and what fell from Lord Redesdale in *Wood v. Rowe*, appear to me to establish, that — at least, in cases where the agreement for compromise goes beyond the ordinary range of the court in the existing suit, and an attempt is made to enforce the agreement in that suit, and the right to do so is disputed — the proper course of proceeding for enforcing it is by bill for specific performance, not by motion or petition in the original suit to stay proceedings. I think, *a fortiori*, this must be the case where the agreement itself is disputed. In *Tebbutt v. Potter*, in which the court appears to have interfered on motion, the only question considered by the court was, whether the plaintiff could be permitted to dismiss his bill without costs; and the case appears to have been argued with reference to the authorities on that point. The difficulty arising from

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enforcing part of the agreement, while the other portion of it did not fall within the range of the suit, does not appear to have been presented to the court; and certainly no question was raised as to any part of the agreement not being binding. Lord Eldon's observations in *Wood v. Rowe* had reference, probably, to the position of the defendant in that case, who was liable to an immediate attachment, and who might, therefore, be well warranted in applying to the court to stay proceedings, though his ultimate course might be by bill for specific performance. On principle, I think the more correct proceeding is by bill, for it is obvious that the court, in trying such matters on motion or petition in the original suit, is called to adjudicate on affidavits upon matters depending on equities distinct from the equity appearing on the record in the cause. I am of opinion that the petitioner in this case has adopted a wrong course of proceeding, so far as he asks, by the petition, to have the agreement for a compromise carried out. It may, indeed, be said on his part, that all he requires is, that the bill should be dismissed, and that this is clearly within the power of the court in the suit; but the question is, not what the petitioner requires, but what, in justice, ought to be done. This must depend, not on part, but on the whole agreement; and if the court cannot see that the whole agreement can be enforced against the petitioner in the suit, it cannot, I apprehend, enforce part of it in his favor. The difficulty of enforcing the agreement in the suit was, I think, felt on the part of the petitioner, for in the reply it was proposed that the order should be to stay proceedings in the original suit on an undertaking to file a cross bill for specific performance. But I ask, What ground is there for such an order being made? The petitioner might have filed his bill without presenting this petition, and he may now do so. He wants no leave of the court for the purpose, and there was not at the time the petition was presented any ground of apprehension, rendering it necessary to make an immediate application to the court. Independently of this consideration, I could not interfere on this petition, for I think on the merits that the court could not, even on a bill being filed, with justice order the staying of proceedings in the original suit, particularly as in the present case the agreement was entered into by an agent. The case stated on the petition is, that after a previous treaty for compromise, which failed, fresh proposals for a further compromise were made, and that on the 23d of July, 1850, a proposal was made in these terms:—

[His honor read the proposals of the 23d of July, and the letters of the 2d and 15th of August, 1850, from a petition.]

It is insisted that these proposals and the letters constitute an agreement which the court will enforce. I am much disposed to think that they do constitute an agreement; but I think it is not an agreement of which the court will decree specific performance. I do not see how it could be enforced against the petitioner—how he could be compelled (to use the language of the proposals) “to use his best exertions to substantiate the greatest claim against Chambers's estate that can legally be admitted.” And again, it is distinctly sworn on the part of the respondents, that the agreement was entered into under

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the apprehension that the executors of Chambers were to be parties thereto. I apprehend that an agreement entered into under a mistake and misapprehension will not be enforced by the court, more particularly as in the present case it was entered into by an agent. Assuming even that a case for specific performance may ultimately be made out, I think the case for an injunction fails. It appears that as early as the 26th of October, 1850, the respondents' solicitor wrote a letter to the plaintiffs' solicitor in these terms:—

[His honor read from the petition the letters of the 26th and 30th of October and of the 15th of November, 1850.]

Now, notwithstanding those letters of the 26th of October and the 15th of November, this petition was not presented until the 9th of December. Now, the petitioner might have proceeded to enforce the alleged agreement early in November: he had notice repeatedly in October that the plaintiffs intended to proceed in this suit. I think, under the circumstances of this case, it was the petitioner's duty to have proceeded earlier if he meant to rely on that. I am of opinion the petitioner has failed both on the merits and the form of the proceeding, and that the petition must be dismissed, and with costs.

THE SHREWSBURY AND CHESTER RAILWAY COMPANY v. THE
SHREWSBURY AND BIRMINGHAM RAILWAY COMPANY.¹

March 31, and April 1 and 3, 1851.

Injunction — Inconvenience — Restraint of Contract.

The S. and B. Railway Company had entered into a contract with the S. and C. Railway Company as to the working of their line. The S. and B. Railway Company now alleged that the contract was void, and proposed to enter into an agreement with the L. and N. Railway Company, the effect of which would be a violation of the contract with the S. and C. Company. The S. and C. Company moved for an injunction to restrain the S. and B. Company from holding a meeting to sanction the agreement. The court refused to interfere, as it was not clear that the contract with the S. and C. Company was valid, and as the loss of the S. and B. Company from not entering into the agreement with the L. and N. Company might be greater than their loss from violating the contract with the S. and C. Company.

The court will, where the necessity of the case requires it, interfere to prevent the defendant from affecting property in litigation by contracts, or conveyances, or other acts.

This case, and the arguments used upon it, will be found fully stated and referred to in his lordship's judgment.

Bethell, Malins, and Giffard, in support of the motion.

Stuart and Hardy, for the directors of the Shrewsbury and Birmingham Railway Company, in the same interest.

Sir W. P. Wood, S. G., Sir F. Kelly, and Follett, for the London

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and North-western Railway Company, opposed; and, besides the cases mentioned in the judgment, cited, as to the balance of inconvenience, *Rigby v. The Great Western Railway Company*, 2 Ph. 44; 10 Jur. 531. *Pickford v. The Grand Junction Railway Company*, 3 Railw. Cas. 538. *Spottiswoode v. Clark*, 2 Ph. 156; 10 Jur. 1043. *Kay v. Marshall*, 1 My. & C. 373. As to the principle on which injunctions are granted, *Dietrichsen v. Cabburn*, 2 Ph. 52.

Rolt and Prior, for the Shrewsbury and Birmingham Railway Company.

Bethell, in reply.

LORD CRANWORTH, V. C. This was a motion by the plaintiffs, the Shrewsbury and Chester Railway Company, asking me to make an order for an injunction to restrain "the defendants, the Shrewsbury and Birmingham Railway Company, their directors, and all other persons acting on their behalf or their authority, from entering into or carrying out the intended agreement with the London and North-western Railway Company, in the plaintiffs' bill mentioned, or any agreement similar thereto, or which shall cause it to be the interest of them, the defendants, to fail in, or shall prevent or obstruct them in carrying out the purposes of the agreement of the 12th of July, 1850, in the plaintiffs' bill mentioned, and from doing or omitting to do, or procuring the doing or omission, either by resolution or otherwise, of any act, matter or thing, the doing or omission of which is or may be in breach or violation of, or repugnant to, or inconsistent with the said agreement of July, 1850, or any of the provisions thereof." The material facts of the case are as follows: The plaintiffs, the Shrewsbury and Chester Railway Company, have a railway from Chester to Shrewsbury opened the whole way. The defendants, the Shrewsbury and Birmingham Railway Company, have a railway from Shrewsbury to Wolverhampton, and so on to Birmingham — that is, a complete railway to Wolverhampton; and from thence they go at present by the line of the London and North-western Railway Company. Of course it became, as the two railways (the Shrewsbury and Chester and the Shrewsbury and Birmingham) united, and, I believe, had a common terminus at Shrewsbury, the common interest of both to provide for what they called "the through traffic," — that is, traffic from Chester to Wolverhampton or Birmingham, and from places north of Chester, coming to Chester, and so on to places through Birmingham, and south of Birmingham, and beyond Birmingham. They did this, or supposed they had done it, by an agreement of the 12th of July, 1850, under which each company was authorized to run their engines and carriages through both lines; and provisions were made for ascertaining the share of each company in the amount of toll received in respect of such transit over the two lines. Either company was to be at liberty to terminate that arrangement by giving three years' notice; but then the company receiving the notice was to have liberty forever of using

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the railway of the other company on certain stipulated terms — I think, of paying half the toll, or some arrangements, the details of which it is not material for me to go into. This contract was dated in July, 1850, received the seals of both companies, and its terms had, in fact, been acted upon and agreed to for a time long anterior, — namely, from October, 1849, — and it has continued in operation up to the present time.

It seems now that a large part of the shareholders of the Shrewsbury and Birmingham Railway Company have become anxious to get rid of this arrangement, and a special general meeting of the company has been duly convened, and is to meet to-morrow, the object being to obtain the sanction of the shareholders to an agreement to be entered into between the Shrewsbury and Birmingham Company, and the London and North-western Company, by which the former company (the Shrewsbury and Birmingham Company) are, in fact, to lease their line to the latter company (the London and North-western Company) for twenty-one years. There was a good deal of transaction between these parties previously to the convening of the special general meeting. I need not advert to those circumstances, because it all ended in the fact, that a special general meeting, for the purpose of taking this matter into consideration, was duly, according to the provisions of the act, convened for the 4th of April, and consequently is to meet to-morrow.

The terms of the present proposition, that the proposed arrangement should take place, appear embodied in a paper, the nature of which I need not enter into, a printed copy of which is put into my hands, intituled "Supplementary Report of the Committee of Inquiry of the Shareholders of the Shrewsbury and Birmingham Company;" and the material terms are these: "The London and North-western Company to work over the Shrewsbury and Birmingham line, (and the Madeley branch, if and when made,) and to have the stations and other conveniences, and all the powers and facilities for that purpose, of the Shrewsbury and Birmingham Railway Company, from the 25th of March, 1851, till the 25th of March, 1872, — that is, twenty-one years, — on the following terms: The traffic to be fairly and fully worked by the London and North-western Company, with a view to its development, and a competent amount of through traffic to be accounted for over the line by the London and North-western Company. The Stour Valley line to be opened within six months from this time. The Shrewsbury and Birmingham Company themselves to cease being carriers, and to keep an account of the maximum tolls calculated in all traffic carried over the line, except by the London and North-western Company, and also of all their (the Shrewsbury and Birmingham Company's) receipts from all other sources, and all these sources of revenue to be made as profitable to the Shrewsbury and Birmingham Company as possible. The London and North-western Company to pay to the Shrewsbury and Birmingham Company such a proportion of their gross earnings, as carriers over the Shrewsbury and Birmingham line, (and branch, if made,) as will make up, when added to

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the maximum tolls and other receipts and revenues mentioned in the last article, the following sums annually, plus an annual sum in each year of 500*l*." I take it that these supposed receipts from the maximum tolls and other sources, in fact, are merely put in by way of embellishment. Nothing was, in fact, ever calculated as likely to arise from that. What they were, in fact, to pay was this: "The interest on the debenture debt for the time being owing by the Shrewsbury and Birmingham Railway Company; secondly, the dividend payable upon the preference stock now issued by the Shrewsbury and Birmingham Railway Company, amounting to 135,000*l*.; and, thirdly, interest upon the ordinary share capital of the Shrewsbury and Birmingham Railway Company, at the following rates, and to be payable half yearly — that is to say, for the first two years at the rate of 3*l*. per cent. per annum; for the second two years at the rate of 3*l*. 10*s*. per cent. per annum; for the remainder" — that is, seventeen years — "at the rate of 4*l*. per cent." Then there are some provisions about the Stour Valley Company. "The capital account to be at once ascertained, as accurately as may be, not exceeding 1,000,000*l*. of ordinary stock, 135,000*l*. of preference, and 21,700*l*. of debentures, 5000*l*. being added to meet casualties. Therefore the sum that would eventually have to be paid would be interest at 4*l*. per cent. on a capital supposed to be about 1,000,000*l*., besides 135,000*l*. of preference, and 21,000*l*. of debentures, which would make annual payment of about 50,000*l*. a year. I do not know that I have calculated it quite accurately, but I think pretty nearly. "The London and North-western Company to take over the stock of engines, carriages, &c.; the amount to be invested, when agreed, in the Madeley branch, or other new works required or after mentioned, or in reduction of the debt; till such investment, the London and North-western Company to pay 4*l*. per cent. thereon," and to adopt certain contracts that had been entered into. I do not know that any of the other terms are at all material to be alluded to.

Now, there can be no doubt of the fact, that the proposed agreement is an agreement altogether inconsistent with the contract of July, 1850. There could no longer be three years' joint traffic, nor after that time a perpetual right in the plaintiffs to use the line if the contract was entered into; and the object of the bill is to enforce the former agreement, and to prevent the Shrewsbury and Birmingham Company from entering into the proposed contract with the London and North-western Company. The ground of the plaintiffs' case is, that they are, in fact, seeking the specific performance of the partnership contract; and there is no doubt, I take it, of the jurisdiction of this court to prevent one partner from excluding another from, or from so acting as to prevent the continuance of, the partnership, according to its terms. That is, in fact, an application substantially for specific performance. If two parties agree to devote their whole time to a partnership concern, this court will not permit one of them to exclude the other from the partnership, or to set up a separate business, which makes it impossible that he should perform his partnership obligation; and the bill seeking to restrain the

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violation of such a partnership contract, though it seeks nothing but an injunction, is, in substance, a bill for a specific performance, or at least a bill to be dealt with on principles analogous to those on which the court acts with regard to specific performance.

Now, here the plaintiffs rest their title to relief upon that principle. Their argument is, that the bill shows a partnership contract, or what is in truth just like a partnership contract, and that it shows an intention, not only to violate, but to destroy, the subject matter of it, and so the plaintiffs say the bill seeks an injunction to restrain the defendants from thus violating their contract — in substance, it seeks a specific performance of the contract of July, 1850. The defendants resist this, mainly upon the ground that the alleged partnership contract is invalid. I say "mainly," because there are some other points which are made about a contract with the Great Western Company, to which I shall not find it necessary to advert at any length. The defendants resist it mainly on the ground that the alleged partnership contract is invalid in law, and, being so, they say they have now an opportunity of entering into an agreement with the London and North-western Company, which would be very advantageous to them, and that the meeting to be held to-morrow has been convened for the purpose of obtaining the sanction of the shareholders to this agreement.

The question therefore really is, whether I ought to restrain the shareholders at this meeting from sanctioning, and the company from entering into, the proposed agreement, or any agreement of a similar nature. The main drift of the argument addressed to me was directed to the obtaining of an injunction restraining the defendants, not from doing any acts interfering with the due enjoyment of the rights under the agreement of July, 1850, nor to prevent them from excluding the plaintiffs' carriages from their line while engaged in through traffic, but to restrain them from entering into a contract, the due performance of which will have that effect. And this appears to me to be a most important distinction. The resolution at the meeting to-morrow will not, and the entering into the agreement will not, affect the plaintiffs; but the acts likely to be sanctioned by the one, and contracted for by the other, will. Now, I do not mean at all to say that this court will not, under some circumstances, prevent parties, pending litigation, from alienating, or even prevent parties from entering into contracts relating to subject matters of litigation. By such alienations or contracts no eventual injury could in general result to the plaintiff; but it may impose on him the necessity of making additional parties, and may delay and embarrass him in the assertion of his rights. In some cases it might even tend to destroy the subject matter in dispute, as would clearly have been the case in *Wilson v. Wilson*, 14 Sim. 405; 9 Jur. 148, which was a suit for the specific performance of an agreement between husband and wife for separation, and pending that suit proceedings were instituted or carried on in the Ecclesiastical Court for establishing the restitution of conjugal rights. Of course, if that suit were dismissed, it would do no harm, nor affect the case at all; but if once the Ecclesiastical

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Court had decreed restitution of conjugal rights, that would substantially have put an end to the subject matter of litigation. Therefore in that case the court interfered. This court, therefore, will, where the necessity of the case requires it, interfere by injunction, during litigation, not only to preserve property *in statu quo*, but sometimes also to prevent the defendant from affecting it by contracts or conveyances, or other acts.

But this latter interference, I must remark, is by no means a matter of course; and that was stated by Lord Eldon in one of the cases I think referred to in the argument—I allude to the case of *Spiller v. Spiller*, 3 Swanst. 557. In that case the defendant Spiller had contracted to sell to the plaintiff Spiller certain copyhold property. I believe the contract was a verbal contract, but possession had been taken and a part of the purchase money paid, and he afterwards became insolvent, or under some obligation to convey all his property to the other defendants, Bunscombe and Wakeley, as trustees. This bill was filed by the purchasers, the Spillers, against the defendant Spiller, and those other persons; and it prayed the specific performance of the agreement, and for an injunction restraining the defendant Spiller from surrendering the copyhold premises to the other trustees. There can be no doubt that by doing so he would not, if the plaintiffs had a right to specific performance, eventually prejudice them, because, *pendente lite*, their rights could not be affected. An injunction, however, was prayed. A motion was made, on certificate of bill filed. Mr. Buck was for the motion. The lord chancellor says this: "The plaintiffs are, under the circumstances, entitled to an injunction." Unfortunately, what the circumstances were we do not know; but I must infer from that expression that there were some circumstances in that case. "But," he says, "I wish it to be understood as my opinion, that in general, on a bill for the specific performance of an agreement to sell"—just the same principle must apply to that which is *quasi* a specific performance of the partnership contract—"the plaintiff is not entitled to restrain the owner from dealing with his property; a different doctrine would operate to control the rights of ownership, although the agreement was such as could not be performed." One sees at once the good sense of that; under the circumstances the court may interfere, if the circumstances require it; but it is a monstrous proposition to say, "I will prevent you from exercising a legal right because somebody else is trying to establish against you an equitable right." Therefore, Lord Eldon says, though the court will do it under the circumstances, it is by no means a matter of course. In that case he did grant the injunction.

Now, when the court is called on to interfere in this case to preserve the property *pendente lite*, there are, I apprehend, two points on which the court must satisfy itself. First, it must satisfy itself, not that the plaintiff has a right, but that he has a fair question to raise as to the existence of such a right. That was so stated by Lord Cottenham in the case to which such frequent reference was made during the argument, of *The Great Western Railway Company*

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v. *The Birmingham and Oxford Railway Company*, 12 Jur. 106 ; 2 Ph. 597. Lord Cottenham there, after saying that the court will, in certain cases, interfere to preserve property *in statu quo* during the pendency of the suit, says, "It is true that no purchaser *pendente lite* would gain a title, but it would embarrass the original purchaser in his suit against the vendor, which the court prevents by its injunction." Then he refers to two or three cases, and among others to that of *Spiller v. Spiller*. "It is true," he says, "that the court will not so interfere, if it thinks that there is no real question between the parties ; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff." That, therefore, is the first point on which the court has to be satisfied, not, as Lord Cottenham says, positively that the plaintiff is right, but that he has at all events a fair title, a fair question to raise. But I do not understand Lord Cottenham then as meaning to say that which, if he had said, he would have been saying something at variance with what Lord Eldon said, that in every case where there is a *prima facie* or probable case suggested the court will interfere. That I cannot conceive to be the doctrine of the court. It would be inconsistent with what Lord Eldon says, and inconsistent with common sense ; for I conceive that even where it is made out that there is a point to be decided which the plaintiff is fairly raising, still there is a further question, namely, whether interim interference, on a balance of convenience and inconvenience to the one party or the other, is or is not expedient. Where the alternative is interference or probable destruction of the property, then, of course, the court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may turn out eventually to be the legal right of the defendant. That was the case in *Wilson v. Wilson*. But where, on the other hand, the only evil to result from non-interference is, that the plaintiff may, by contract or deed, be retarded or embarrassed in his litigation, there I apprehend the court will be far more ready to listen to any suggestion of the defendant, showing that interference during litigation will prejudice his rights.

Now, acting on these views, the first thing I have to satisfy myself of is, whether there is a real question between the parties under the deed of July, 1850. *Prima facie*, that deed gives the plaintiffs a perfectly good title. The question is, whether the defendants have any real ground for disputing its validity. This is the converse of the question argued in the case before Lord Cottenham, but I think exactly the same principles apply. Now, I do not feel myself called on to give an opinion, ay or no, whether that is a legally valid contract or not. If I were so called on, I certainly should feel very great difficulty in acceding to the labored argument of Sir Fitzroy Kelly, that the arbitration clauses make this a contract of necessity void at law, as having been something done *ultra vires* — something militating against the well-known maxim, "Delegatus

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non potest delegare." I should have a doubt about it. I have much more doubt as to its validity on another part of the contract, namely, the 7th and 8th sections of it, whereby, the stipulation being that either party might terminate it by giving three years' notice, it was agreed that for all time afterwards the party receiving the notice shall be at liberty, on certain stipulated terms, to use the railway of the party giving the notice; for that does seem to me to be *quasi* a lease of it forever, or at least something like it; but even on that I give not the least opinion whether that is a legal objection or not. I certainly do not feel myself called on to decide, or competent to decide, that that is so entirely a frivolous and ridiculous objection, that I shall treat it as being utterly worthless, and act against the party just as if he had raised no such point at all.

There is another point which has struck me. Suppose it is invalid, *quære*, whether this is not a divisible contract, so that the court might perform part of it? It is a contract under seal, and there may be a question whether the consideration is not entire, and running throughout; and, indeed, I see a great number of questions that may be raised on this point, satisfying me that it is not a mere pretence to say that there are doubts entertained about the validity of the contract. I cannot say that I am so entirely clear on that, that I can treat the parties as being guilty of a sort of fraud or imposition on the court, in pretending that there is any doubt as to its validity. Then that being so, I have this before me — a contract sought to be enforced by means of this injunction; and as to which I think not only have the plaintiffs probable ground for saying there is such a contract, but if I were to determine it, the leaning of my mind is in their favor that it is a valid contract; still I think there is a *bona fide* dispute as to whether that is valid or not. Then it is said, in that state of things I ought to be governed by that which occurred in the case of *The Great Western Railway Company v. The Birmingham and Oxford Railway Company*, which, it is said, is precisely the same case. In that case the defendants, the Birmingham and Oxford Company, had entered into a contract to sell their railway to the plaintiffs, the Great Western Company, and the bill was filed by the Great Western Company against them, praying the specific performance of that agreement; and it alleged that they were obliged to take such proceeding, because the Birmingham and Oxford Company, contending for the invalidity of their contract with the Great Western Company, were proceeding to enter into a contract to sell to the North-western Company; and the bill there, as here, prayed that the defendants "might be restrained by injunction from entering into any agreement for the sale of that railway to the London and North-western Railway Company, or from in any manner dealing with such railway, or with the property or effects thereof, except with the approbation of the plaintiffs; and from doing, or omitting to do, or procuring the doing or omission of any act, matter, or thing, the doing or omission of which was, or might be, in breach or violation of, or repugnant to, or inconsistent with the said agreement." Now, it is said the case now before me is precisely the same, and,

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undoubtedly, I feel that there is a very great resemblance indeed. Lord Cottenham, in that case, did interfere. Then, what was pressed on me was, ought not I to interfere just in the same way, almost, so to say, blindfold? because I certainly should be the last to dispute the proposition, that where a matter has been decided by a superior court, even if I doubted its propriety, I am bound to follow it. I have acted on that principle in several cases restraining parties from obtaining compensation. I have only reversed my own decision, or discharged an injunction which I granted myself, because, since I acted on that decision of Lord Cottenham, the present lord chancellor has made a decision which appears to me, with all deference to him, although he says it does not mean to overrule the other, to be in direct opposition to the decision of Lord Cottenham. Therefore, if I found this case of *The Great Western Railway Company v. The Birmingham and Oxford Railway Company* an express authority guiding me, I should feel I was bound to act on it, even if I felt a doubt as to its propriety; but I cannot say, that, on full consideration, I do come to that conclusion, and I will state why.

In the first place, Lord Cottenham's arguments here are directed to the demurrer. It is true, that on that demurrer being overruled, the injunction that had been granted by the vice chancellor was also established. Unfortunately for me, at least for my peace of mind, in this matter we have none of the arguments that were urged upon the injunction; nor have we, which is much more material, any of the affidavits that were before the court. If it is to be assumed that, as a matter of course, because the bill was not demurrable, therefore an injunction was to issue, I should say, then I have to decide between what Lord Eldon says and what Lord Cottenham says. It is quite clear Lord Eldon says that it is not the law of the court — it cannot be; and I come to that conclusion, because, although Mr. Bethell, who was counsel in the case, I think, stated (I have no doubt perfectly accurate,) that the injunction was sustained, yet I very much doubt whether that could mean any thing more than this, that the injunction was sustained because there were no circumstances brought before the court putting the propriety of the injunction and the decision on the demurrer at all in conflict the one with the other. Not having the affidavits before me in that case, I do not know what there was to show any countervailing inconvenience that would result from issuing the injunction. Probably there was none; and if so, it would be true, that, as a matter of course, when I once determine that here is a bill for the specific performance of an agreement, and the party, it is said, is going to enter into a contract that will embarrass me in my litigation, the first impulse of the court would be to prevent that. If there were nothing else to hold their hands, it would be right to do so; and I must take for granted, that, if the injunction went, it was because there was nothing of that sort brought forward. I cannot but suppose that if there had been a conflict on the point, namely, what quantity of inconvenience resulting to the defendant would induce the court to hold their hands, that would have been argued, and the affidavits would have been con-

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trusted, and Lord Cottenham would have given some opinion on it. Now, then, is that the case here? I must say here, that so far from that being the case, I think that by granting the injunction in the terms in which I am asked to grant it, I should be occasioning to these defendants irreparable injury, to an extent that it is fearful to contemplate. They are proposing to enter into a contract with the London and North-western Company, under which the London and North-western Company bind themselves, as I understand it, to pay to them a sum which amounts to 40,000*l.* or 50,000*l.* a year, for twelve years. That is the advantage which they are to have. Supposing it were to turn out in the result, if I were to issue this injunction, that the defendants are right, and that the Court of Queen's Bench, or the Court of Exchequer, or the Court of Common Pleas should hold that the agreement which you entered into is invalid, that it is invalid *in toto*, that, therefore, there was no legal bar to your entering into this contract—and Mr. Chesshire has made an affidavit that he believes this contract to be most highly beneficial to the defendants, and that he believes the London and North-western Company are now ready to enter into it, but that he verily believes that if it is delayed they will not be willing to enter into it—in what predicament would this court then find itself, if it should have issued an injunction restraining the defendant from entering into a contract *ex hypothesi* a valid contract, which there was no legal ground to prevent them from entering into, and then afterwards they should be unable to enter into it, and so lose 50,000*l.* a year for twenty-one years? Therefore, whatever may have been the case of *The Great Western Railway Company v. The Birmingham and Oxford Company*, in this case it is obvious the effect of my injunction will, or may, be likely to cause enormous injury to all the shareholders in the company who are the present defendants.

Now, that is the ground on which I feel myself bound in this case to refuse the injunction. I have explained it shortly, and as I hope clearly, so that the parties may see the ground upon which I am going. It is this—that although I am perfectly satisfied of the authority of this court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that may embarrass the plaintiff in his suit, and that the court is entitled to do so whenever it sees there is a fair ground for litigation raised by the plaintiff, yet that right of the court must be guided by a discretion not to exercise it where it sees that, on the balance of convenience and inconvenience between interim interference and non-interim interference, the balance greatly preponderates in favor of the defendant and against the plaintiff. Now, here, the injury to the plaintiffs, in comparison to the injury to the defendants, is extremely small. The contract may be put an end to in three years. The present rate of through traffic seems to be something like 12,000*l.* a year. Three years would be something like 36,000*l.*, that is, on both lines, so that it would be the half of that. They would be entitled, if there was no other remedy, to an action for that; and though it may not be quite easy for them to prove the

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exact amount they lose, yet that is a matter not altogether incapable of being estimated; and on the whole, the conflict between the convenience and inconvenience, on the one side or the other, seems to me, beyond all measure, to preponderate in favor of the party who has the legal right to enter into any legal contract he pleases. That is the short ground on which I feel myself bound to refuse the injunction. I think it is necessary for me to add, that I had some little doubt whether I ought to issue an injunction only in the terms of the last part of the notice of motion, in which I am asked to restrain the party "from doing, or omitting to do, or procuring the doing or omission, either by resolution or otherwise, of any act, matter, or thing, the doing or omission of which is, or may be, in breach or violation of, or repugnant to, or inconsistent with, the agreement." But on full consideration, I do not think I ought. My decision, refusing this injunction, does not at all prejudice the question, whether, if this proposed agreement, or any similar agreement, should be entered into, the plaintiffs may not be entitled to an injunction restraining the defendants; or rather, in that case, restraining the North-western Company from so acting under that agreement as to exclude them, the plaintiffs, from the Shrewsbury and Birmingham line, or from conducting the through traffic according to the terms of that contract. My refusing this injunction does not at all prejudice that question, and I think I should be very much embarrassed in the case if I were to grant an injunction on that which, in truth, was not the point argued before me.

The point mainly, almost entirely, argued before me, was as to the holding of this meeting and entering into the contract. I think I ought not to embarrass it, for two reasons. In the first place, I think I ought not to interfere to restrain parties, not from doing any thing which they at present are going to do, but which it is supposed they will, under a contract which they will enter into, authorize other persons to do. I think that would be an unnecessary anticipation of an evil that never may happen. I cannot tell that the meeting may sanction this agreement, or that it will be entered into. I cannot tell that it may not be so modified as to secure to all parties the rights they may have under this agreement of July, 1850; and after all, the parties to be restrained in such a case would have to be made parties by supplemental bill, or in some other way, namely, the London and North-western Company. Upon the whole, therefore, on full consideration, my opinion, on the ground I have stated, namely, the enormous preponderance of inconvenience there might be in granting the injunction over any possible inconvenience there might be in refusing it — my opinion is, that I ought to refuse the injunction.

In re The Trustee Act, 1850; and in re The Trusts of Hodgson's Settlement.

*In re THE TRUSTEE ACT, 1850; and in re THE TRUSTS OF
HODGSON'S SETTLEMENT.*¹

June 16 and 17, 1851.

Trustee Act, 1850 — The 32d Section.

Precautions required to be observed before the court will appoint new trustees under the Trustee Act, 1850, in cases where the trust deed has given power to a party to appoint, and that party refuses to exercise such power.

The 32d section of the Trustee Act, 1850, does not give jurisdiction to the court to remove a trustee who is willing to act.

THIS was a petition for the appointment of new trustees, under the Trustee Act, 1850, of a settlement dated in August, 1809. By that settlement certain real property was vested in James Lee and J. B. Lister, upon trusts which were declared to be for E. Hodgson for life, and after his death, for his wife, Mary Hodgson, for life; and after the death of the survivor of them, for the children of their marriage, if any; and if there should be no child of such marriage, then upon trust to sell the property, and hold the proceeds upon the trusts therein mentioned. It was provided by the settlement that if James Lee and J. B. Lister, or either of them, or any surviving trustee to be nominated in their or either of their stead, in manner thereafter mentioned, should at any time during the continuance of the trusts happen to die, or desire to be discharged from the said trusts, or refuse or be rendered incapable to act in the execution of the same, it should be lawful for the said E. Hodgson and wife, and the survivor of them, and after the death of such survivor, for the remaining or other trustee, by deed duly attested, to nominate and appoint new trustees or a new trustee in the place of the trustees or trustee so dying, or desiring to be discharged, or becoming incapable to act. It was stated by the petition, which was presented by the parties interested in remainder, in default of children of the marriage of E. Hodgson and Mary Hodgson, that in 1810 Mary Hodgson died, and that there had been no child of her marriage with E. Hodgson; that James Lee died in 1829; that Lister was seventy-eight years of age, and had expressed a desire to retire from the trusts: and that E. Hodgson, after parting with all his beneficial interest under the settlement, had refused to exercise the power to appoint new trustees given to him by the settlement, unless a consideration were paid to him for so doing. Under those circumstances, the petition prayed for the appointment of new trustees in the place of Lee, deceased, and of Lister. The facts stated in the petition were verified by affidavit; but on the other hand, affidavits were filed by the respondents Hodgson and Lister, stating that the former was willing to exercise his power to appoint a trustee in the place of Lee, and that Lister had never assented, and that he did not now desire, to retire from the trust. The question was, whether, under these

¹ 15 Jur. 552.

In re The Trustee Act, 1850; and in re The Trusts of Hodgson's Settlement.

circumstances, the court had jurisdiction under the act to make the appointment prayed.

Makins and *Bilton*, in support of the petition, contended that, under the 32d section of the statute, the court had power to appoint new trustees wherever the state of circumstances at the date of the petition showed that it would be expedient so to do. In the case before the court there could be no doubt of the expediency of the appointment, for there was now, instead of two trustees, as directed by the settlement, one only, and that one too old properly to manage the trusts. The tenant for life, Hodgson, by bargaining for a price to exercise his power, had rendered it necessary to come to the court, and he would not be allowed now to insist on his right to exercise his power. In determining upon that right the court would look at the state of things at the date of the petition, and if it found that the petition had been rendered necessary by the conduct of the donee of the power, it would deprive him of his right to exercise that power.

Shebbeare, for respondents beneficially interested under the settlement, took the same line of argument.

C. P. Cooper and *R. Levinge Swift*, for E. Hodgson, contended that the statute did not extend to give the court jurisdiction either to remove a trustee who desired to continue in the trust, or to appoint a new trustee where there was a power to do so given to a party by the deed of trust, and that party did not refuse to exercise it.

Bilton, in reply.

SIR GEORGE TURNER, V. C. The first difficulty in this case arises upon the power vested in E. Hodgson; for if that power still remains in and can be exercised by him, unless I can find that, under the provisions of the statute, I am enabled to prevent him from exercising that power, I cannot appoint a trustee under the act in the place either of *Lee* or of *Lister*. I cannot appoint one in the place of *Lister* unless I remove him, and if I removed him I could not appoint another in his place, unless the provisions of the statute enable me to take away from Hodgson the power vested in him by the settlement. Now, the 32d clause of the statute runs thus: [His honor read the 32d section of the act.¹] The question is, whether that provision of the statute authorizes the court to appoint a new trustee where there is a legal power to appoint one vested in a party who is willing to exercise it. I am of opinion that it does not; and the ground of my conclusion is, that, looking at other provisions of the act, I see that it is not the intention of the legislature ever, in dealing with the legal estate, to deal with it except on proper precautions being taken. Thus, the 17th section of the act, by which power is given to the court to convey real estates in the place of a refusing trustee, runs thus: [His

¹ The 32d section enacts, "that whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do, without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or trustees, either in substitution for or in addition to any existing trustee or trustees."

In re The Trustee Act, 1850; and in re The Trusts of Hodgson's Settlement.

honor read the 17th section.^{1]} So that where the act proposes to take the legal estate in lands out of a refusing trustee, the precaution is prescribed of having either a declaration in writing that he will not convey, or a proper deed of conveyance prepared and tendered to him by the party entitled to require the same. So, in another provision of the statute, upon the subject of a transfer of stock, (the 24th section,²) a similar precaution is required to be taken. It is clear, therefore, that it was not the intention of the legislature to take legal estates out of trustees without the observance of a proper degree of precaution; and I think it a reasonable inference that it was not intended to take away a legal power vested in a party without a similar degree of precaution being observed. These or similar precautions not having been observed here, I am of opinion that, under the provisions of this statute, I cannot take away the power vested in Hodgson, however irregularly he may have intended to exercise it. That, in effect, disposes of the case, for if I have not power to appoint a trustee in the place of Lee, I clearly cannot have it to appoint one in the place of Lister if I remove him. Independently of that, however, I think that this statute was not intended to give the court jurisdiction to remove a trustee, where he states that he is desirous of continuing to act in the trust. The provision empowers the court, whenever it is expedient, to appoint new trustees. I think this is confined to the appointment of new trustees, and that it does not extend to the dismissal from the trust of a willing trustee. The petition must therefore be dismissed, but without costs, as I cannot say that it has been improperly presented; because, if Hodgson had persevered, when here, in his refusal to exercise the power, and if Lister had taken the same course here as he did before the petition was presented, and stated that he desired to retire from the trust, the court might have found a means of dealing with the case under the provisions of the statute.

Petition dismissed, without costs.

¹ The 17th section enacts, "that where any person jointly or solely seized or possessed of any lands upon any trust shall, after a demand by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey or assign the same, or shall neglect or refuse to convey or assign such lands for the space of twenty-eight days next after a proper deed for conveying or assigning the same shall have been tendered to him by any person entitled to require the same, or by a duly authorized agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate."

² The 24th section enacts, "that where any one of the trustees of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a neglect in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, in the other trustee or trustees of the said stock or chose in action, or in any person or persons whom the said court may appoint jointly with such other trustee or trustees."

CASES

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER.

FROM AND AFTER HILARY TERM, 14 VICT., A. D. 1851.

IN THE EXCHEQUER CHAMBER.

HALL & others v. FLOCKTON & others.¹

Hilary Vacation, February 3, 1851.

Pleading — Accord and Satisfaction — Acceptance of Agreement in Satisfaction.

A plea to the further maintenance of an action on the case stated that it was agreed between the plaintiffs and the defendants that the defendants should do certain things, and that the action and causes of action included in the same should be settled, satisfied, discharged, and terminated by the arrangement and agreement before mentioned. The plea then averred performance by the defendants of some of the things, and readiness and willingness to perform the others:—

Held, that the plea was bad, as it did not distinctly aver that the plaintiffs accepted the agreement in satisfaction and discharge of the causes of action.

THIS was a writ of error from the Court of Queen's Bench, who, on a demurrer to a plea, had given judgment in favor of the plaintiffs below.

The pleadings are fully set out in the report of the case in the Court of Queen's Bench. *Flockton v. Hall*, 19 Law J. Rep. (N. S.) Q. B. 1.

Phipson, for the plaintiffs in error, the defendants below. It is objected that this is a plea of accord without satisfaction, and therefore bad. The ordinary rule is, accord without satisfaction is no bar to an action. Com. Dig. tit. "Accord," B, 3, 4, and *Lynn v. Bruce*, 2 H. Black. 317; but the distinction is laid down, that when the agreement

¹ 20 Law J. Rep. (N. S.) Q. B. 208. *Coram* PARKE, ALDERSON, BB., CRESSWELL, J., PLATT, B., WILLIAMS, TALFOURD, JJ., and MARTIN, B.

Hall & others v. Flockton & others.

is to be accepted in discharge and termination of the causes of action, the agreement may be pleaded in bar to the further maintenance of the action without any averment of fulfilment. Com. Dig. tit. "Accord," B. 4. *Case v. Barber*, T. Raym. 450. *Good v. Cheesman*, 2 B. & Ad. 328; s. c. 9 Law J. Rep. K. B. 234. *Wallace v. Kelsall*, 7 Mee. & W. 264; s. c. 10 Law J. Rep. (N. S.) Exch. 12. *Peytoe's Case*, 9 Rep. 79, b. *Cartwright v. Cooke*, 3 B. & Ad. 701; s. c. 1 Law J. Rep. (N. S.) K. B. 261, and *Evans v. Powis*, 1 Exch. Rep. 601. From the terms of the agreement itself, it appears that the plaintiffs accepted the agreement in satisfaction of the causes of action. The plea alleges that the plaintiffs agreed to accept the agreement and arrangement in satisfaction. The words "agreement" and "arrangement" are synonymous.

[*Parke, B.* The term "arrangement" is ambiguous. It may mean entering into the agreement, or it may mean completion of the agreement.]

The latter part of the plea shows that the word "arrangement" merely means the agreement itself. It is a superfluous word.

[*Parke, B.* It is alleged, as a ground of special demurrer, that the plea does not aver that the agreement was accepted in satisfaction.]

Secondly, the plea avers performance in satisfaction of the accord. It alleges that the defendants have done every thing which by the agreement they were bound to do.

[*Maule, J.* The plea does not aver that the plaintiffs accepted the performance in satisfaction. If it be pleaded that it was agreed that the defendant should deliver a horse to the plaintiff in satisfaction and discharge of the debt, and the plea went on to aver that he did deliver the horse, and that the plaintiff accepted the same, the plea would be bad unless it had averred that the plaintiff accepted the horse in satisfaction. You must contend that the first part of your plea contains a sufficient defence.]

Mellish, for the defendants in error, was not called upon.

PARKE, B. We are all of opinion that the judgment of the Court of Queen's Bench was correct, and that the plea is defective in not stating that the plaintiffs accepted the substituted agreement in satisfaction. The plea only states that the plaintiffs agreed to accept the agreement and arrangement in satisfaction and discharge. That must mean something more than the mere agreement. We are not to be considered as saying that there may not be many other objections to the plea. It is sufficient for us to say, that there is no distinct averment in the plea that the agreement was accepted by the plaintiffs in substitution of the defendants' liabilities for the infringement of the patent.

Judgment affirmed.

Gorrings v. Terrewest.

GORRINGE v. TERREWEST.¹

Bail Court, Hilary Term, January 15, 1851.

Distringas to compel Appearance — Defendant keeping out of Way, in London — No Calls or Appointments.

The defendant had no known residence, and could not be found, but he called occasionally at his solicitors' for letters and answered such letters, posting them in London. The plaintiff's solicitor wrote to the defendant, enclosing a copy of the writ of summons, directed to the defendant at his solicitors', and a correspondence afterwards passed between the plaintiff's attorney and the defendant respecting a compromise of the plaintiff's claim.

The court granted a *distringas* to compel an appearance, though there had not been the usual calls and appointments.

THIS was an application for a *distringas* to compel an appearance.

The affidavit showed that the defendant was an attorney, and had been formerly in partnership with Mr. Whiteman, at Eastbourne, during which time defendant resided on a farm at Westham, in Sussex, until October, 1849; that he then quitted the farm for the purpose, as the deponent, plaintiff's solicitor, believed, of avoiding his creditors; that on inquiry, Whiteman told deponent that he could not find the defendant, but was in communication with him by letters, addressed to the defendant at Messrs. Barclay, Farquharson, and Waters, 36 Lincoln's Inn Fields, his attorneys; that deponent accordingly wrote to the defendant at that address, and on several occasions received answers from the defendant in due course; that on the 16th of May, 1850, deponent wrote to the defendant at the same address, enclosing a copy of a writ of summons in an action of debt at the suit of the plaintiff; that on the 29th of May, the defendant wrote to a Mr. Barber, requesting him to ask the plaintiff not to take legal proceedings against him; that the letter being shown to the deponent, the deponent wrote to the defendant proposing to give him time, and in the letter recited the fact of having sent the defendant the copy of the writ of summons; that various letters passed on the subject between the deponent and the defendant respecting an arrangement in satisfaction of the plaintiff's claim between June and December, 1850; that the defendant's letters never had any address, but by the postmark appeared to be posted in London; that the deponent's letters were all addressed to the defendant at his attorney's, 36 Lincoln's Inn Fields; that on inquiry at his attorney's, deponent was told that they did not know the defendant's address or residence, but that he called occasionally for his letters.

Bramwell, in support of the application. In this case there have not been the three calls and two appointments usually required; but the affidavit shows that to the best of the deponent's belief a copy of the writ of summons has reached the defendant's hands, and also that it is not possible to take the ordinary course. Sending a copy

¹ 20 LAW J. Rep. (N. S.) Q. B. 209.

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of the writ is not equivalent to a personal service, for the party who receives merely a copy would not have an opportunity of looking at the original, and therefore the plaintiff is obliged to apply for a *distringas*. The necessity of three calls and two appointments arises only from the practice of the court, not from any rule of court or from the enactments of the statute.

ERLE, J. I think that you have stated enough to bring yourself within the words of the statute. The rule of practice respecting the calls and appointments must be subject to several contingencies. It appears to me that you have shown ground for taking yourself out of the ordinary rule.

Rule granted.

REGINA v. BANNATYNE & others.¹

Bail Court, Hilary Term, January 31, 1851.

Benefit Society — Requisition to Secretary, &c., to sign Notice for Meeting for altering the Rules — Discretion of Secretary, &c., to refuse.

The members of a benefit society whose rules have been duly confirmed according to the provisions of stat. 10 Geo. 4. c. 56, have no right to compel the secretary or other chief officer of the society to sign a notice pursuant to sect. 9, to convene a general meeting for the purpose of considering the question of altering the rules of the society, but such officers have under that section a discretionary power to give or withhold their signatures to any such notice.

THIS was a motion for a *mandamus* to call upon the president, vice president, and secretary of the Aldham and United Parishes Insurance Society, or one of them, to sign a notice according to the statute, to convene a general meeting of the members of the society, for the purpose of taking into consideration the expediency of altering the rules of the society.

The society in question was a benefit society, established in 1836, and its rules had been duly confirmed within the statute 10 Geo. 4. c. 56. On the 12th of October, 1850, a notice was served upon Mr. Bannatyne, the secretary of the society, signed by upwards of two hundred members, and addressed to the president, vice president, and secretary requiring them in pursuance of the statute to sign a notice for convening a meeting for the purpose of taking into consideration the amending and altering of the rules of the society. No notice for convening such a meeting was signed by the secretary or any other officer of the society. The requisition was not read at any of the usual meetings of the society, though several were held subsequent to its service.

Hawkins, in support of the application. The secretary, it is submitted, was bound by sect. 9 to convene a meeting pursuant to the

¹ 20 Law J. Rep. (n. s.) Q. B. 210.

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requisition of so numerous a body of members. Seven members are sufficient for that purpose. Here the requisition was signed by two hundred. Unless the officers of the society sign the public notice when called upon by a sufficient number of members, the matter cannot be considered by the society. If they have a power of refusing their consent they can prevent the alteration of the rules of the society, though every member wish for an amendment.

Cur. adv. vult.

ERLE, J., now said: A rule *nisi* for a *mandamus* to the president, vice president, and secretary of a benefit society was moved for, commanding one of them to sign a requisition for a general meeting to consider the alteration of the rules of the society. The affidavit showed that two hundred members desired such a meeting, and required the signature of the officer, pursuant to the statute 10 Geo. 4, c. 56, s. 9, according to which a requisition of seven members so signed is one of the preliminaries necessary for holding a general meeting. But it appears to me that the members have no legal right to demand the signature of the officer to their requisition, that the legislature intended to prevent the rules from being altered unless one of the chief officers would sign the requisition, and that it has been left to those officers to decide whether it is their duty to give their signature or not. The rule, therefore, is refused.

Rule refused.

THE MAYOR, ALDERMEN, AND BURGESSES OF BIRMINGHAM v.
WRIGHT & another.¹

Hilary Vacation, February 13, 1851.

Municipal Corporation — Special Overseer — 7 Will. 4, & 1 Vict. c. 81 — Annual Office — Bond — Surety.

A special overseer appointed under the 7 Will. 4, & 1 Vict. c. 81, s. 3, to make, levy, or collect borough rates in a parish lying partly within and partly without a borough, is not an annual officer, nor is he such an officer as could be appointed under the 5 & 6 Will. 4, c. 76, s. 58.

Therefore, where the defendants had entered into a bond as surety for W. R., and the condition of the bond recited that W. R. had been appointed to act as overseer for making, &c., borough rates within part of the parish of A., situate within a borough, during the pleasure of the council, and the bond was conditioned for the due performance of his duties by W. R. during such time as he should act as such overseer; and in an action upon the bond the defendants set out the bond and condition upon oyer, and pleaded that W. R. was duly appointed by the council to act as such overseer, subject to the pleasure of the said council, for the period of one year and no more, under and by virtue of the 7 Will. 4, & 1 Vict. c. 81, and alleged performance of the duties of the said office by W. R. during the period of one year for which he acted as such overseer:—

Held, (on demurrer to the replication,) that the plea was no answer to the action.

DEBT on bond in a penalty of 500*l.* entered into by the defendants' testator, E. P. Turner. The defendants set out the bond and condi-

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tion upon oyer, by which it was recited that the testator was surety for one William Robbins, and who had been, with one William Mayne, appointed to act as overseer for making, levying, and collecting the borough rates within that part of the parish of Aston which is within the said borough, during the pleasure of the said council, and that the bond was conditioned to be void if W. Robbins should, from time to time, and at all times during such time as he should act as such overseer, well and truly and duly execute and perform the duties of his said appointment, and duly and faithfully make, levy, demand, collect, and receive all such sums of money as should be by the order and direction of the council of the said borough assessed or taxed upon that part of the parish of Aston which is within the said borough, in or towards the borough rate, pursuant to the directions of any warrant under the corporate seal of the said borough which should be directed to be served upon him. The plea then averred that the said W. E. Mayne and W. Robbins were duly appointed by the said council of the said borough of Birmingham to act as such overseers for the making, levying, and collecting borough rates within that part of the said parish of Aston which is in the said borough, subject to the pleasure of the said council, for the period of one year and no more, to wit, for one year from the 25th day of March, 1847, under and by virtue of the 7 Will. 4, & 1 Vict. c. 81; that the said W. Robbins did from time to time, and at all times after the making of the said bond and condition, and during the said period of one year during which he acted as such overseer, well, truly, &c., execute and perform the duties of his said office, &c.

Replication, that the said W. Robbins was appointed by the said council of the said borough to act as overseer for the making, levying, and collecting the borough rates within that part of the parish of Aston which is in the said borough, during the pleasure of the said council generally, and for no definite period or time certain, *absque hoc*, that the said W. Robbins was appointed such overseer for the period of one year and no more, *modo et forma*.

Special demurrer, on the ground that the appointment of the said W. Robbins could by law only be for one year, and that the surety would not be liable upon any reappointment of him, and that the replication was, therefore, no answer to the plea. Joinder in demurrer.

Willes, in support of the demurrer. The question raised here is, whether the appointment of a special overseer by the town council generally enures in point of law as an appointment for a longer period than a year. This depends upon the 5 & 6 Will. 4, c. 76, s. 58, which enables the council of every borough every year to appoint such officers as they shall think necessary for enabling them to carry into execution the various powers and duties vested in them by virtue of that act, and to take such security for the due execution of their office as the council shall think proper. That section is the one which gives authority to take security from all officers, which would include overseers appointed to collect borough rates. Then, by the

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7 Will. 4, & 1 Vict. c. 81, s. 3, wherever any parish lies partly within and partly without any borough, the council may appoint one or more proper person or persons to act as overseers within that part of the parish which is within the borough, for making, levying, and collecting any borough rate therein. That section was intended to supply a defect in the 5 & 6 Will. 4, c. 76, s. 92, empowering borough rates to be levied, and the special overseers are merely substituted for the officers who would have been previously appointed to collect rates in such cases, and the recital in the condition shows that these overseers were appointed under the 7 Will. 4, & 1 Vict. c. 81. If so, they must hold their office annually, like all other officers of the corporation, except the town clerk and treasurer. It was not meant to give the council a discretion as to the period for which they could appoint these officers. The special overseers are merely ministerial officers. *The Queen v. The Mayor, &c., of New Windsor*, 7 Q. B. Rep. 908; s. c. 13 Law J. Rep. (N. S.) Q. B. 337. *Cobb v. Allan*, 10 Ibid. 683; s. c. 16 Law J. Rep. (N. S.) Q. B. 397.

[*Patteson, J.* Supposing this to be an annual office, there would be no illegality in taking a bond conditioned for performance of the duties on any reappointment. *Augero v. Keen*, 1 Mee. & W. 390; s. c. 5 Law J. Rep. (N. S.) Exch. 233.]

It would be good if it were so expressed in the bond. But here only one appointment, and that a general appointment, is referred to. The court will look to the nature of the office to see whether the obligation of the bond continues in force for more than a year. *Lord Arlington v. Merricke*, 2 Wms. Saund. 415, b, n. (h.) *Peppin v. Cooper*, 2 B. & Ald. 431. See *Bamford v. Iles*, 3 Exch. Rep. 380; s. c. 18 Law J. Rep. (N. S.) M. C. 49.

Crompton, contra. The defendants' testator became surety upon the appointment of Robbins as overseer during the pleasure of the council. Such a contract is not illegal, and must be binding. If the office is necessarily only annual, it must be taken that the general averment of an appointment means an appointment for a year. But suppose instead of appointing him merely for a year, the council wrongly appoint him for a longer period, as alleged in the replication, still it would be only at pleasure, and by his contract the defendants' testator agreed to be liable so long as Robbins should hold the office during the pleasure of the council. Therefore, his liability cannot be limited merely to a single year.

[*Patteson, J.* If justices were to appoint an overseer during pleasure, that would not make them overseers for more than a year.]

Next, these special overseers are not corporate officers to be appointed annually, within sect. 58 of 5 & 6 Will. 4, c. 76, but only where there is a borough rate which is required to be collected; and the council may levy such a rate as often as they choose.

[*Coleridge, J.* The 7 Will. 4, & 1 Vict. c. 81, s. 2, enables the council to levy a rate for by-gone purposes, and sect. 3 provides for special overseers to collect such rates. Their office cannot, therefore, be annual.]

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There is no reason why they should be appointed only for a year, as they are to act for a particular emergency and for a specific district.

[*Patteson, J.* According to that argument, a special appointment for every rate would be required.]

The appointment may be to collect all rates made during the time in which the pleasure is not revoked. Until the 7 Will. 4, & 1 Vict. c. 81, the case of parishes partly within the borough was not provided for. The only mode of collecting the borough rate was by getting it from the overseers of the poor.

Willes, in reply. If the liability of the sureties was confined to the collection of the particular rate, no question would arise, but in truth these overseers are ministerial officers appointed by the council, and they are bound to give security like any other such officers.

[*Coleridge, J.* They may make a special rate. That is not a ministerial duty.]

At all events, they act as the paid servants of the council, and are, therefore, within the 5 & 6 Will. 4, c. 76, s. 58. Sect. 92 gives the council the same power as county justices possess under the 55 Geo. 3, c. 51, in levying a county rate, sect. 8 of which act enables them to appoint a special officer to collect the rate where there is no regular overseer, as would be the case where part only of a parish is within the borough. Such an officer would be within sect. 58, and so is also the overseer substituted by the 7 Will. 4, & 1 Vict. c. 81.

PATTESON, J., after reading the bond and condition as set out in the plea: There is an averment that Robbins was appointed to act as such overseer for making and levying such rate during the pleasure of the said council for one year and no more, under and by virtue of the 7 Will. 4, & 1 Vict. c. 81. The terms of the condition itself certainly treat this as a general appointment during the pleasure of the council. Now, it is said that the words "during the pleasure of the council" import that the appointment is for a year, because it is an annual office and enures as such. The plea does not refer to sect. 58 of the 5 & 6 Will. 4, c. 76, but to the 7 Will. 4, & 1 Vict. c. 81. Whether or no any appointment under sect. 58 would be essentially an annual appointment, it is not necessary to say. But the appointment of a special overseer under the 7 Will. 4, & 1 Vict. c. 81, is essentially not an annual office. Whether there is any power to appoint any person to be an overseer prospectively is not now before us. I should have thought that the corporation must first make a borough rate, and afterwards from time to time separately appoint overseers to collect it. But it certainly cannot be an annual office. Then, I do not see how it can be said that the plaintiffs could not traverse the allegation that the appointment was for one year and no more. Sect. 58 does not apply to the present case. I do not know whether the corporation had authority to appoint any one to collect the rate under the first act, or to take a bond; but they have done so, and the defendants' testator has entered into the bond, and

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has stated in it that the appointment was during the pleasure of the council, and that he should be surety for the performance of the duties so long as he should act. So far as the contract goes it does not allude to any annual office, and by law it was not an annual office.

COLERIDGE, J. The appointment in terms is general. The defendants put upon it the construction that it was limited to a year and no more, and this the plaintiffs deny. The question is, whether it was so limited. If it were so, it must be by force of the statute giving power to appoint for a year. Perhaps, if that were so, we might so construe it; but I do not see that any such restriction can arise from the statute, but rather the contrary. It is clear that this officer could not be appointed under sect. 58; and to meet the difficulty which thus occurred, the 7 Will. 4, & 1 Vict. c. 81, was passed, which in terms gives a power to appoint special overseers without any reference to sect. 58. Therefore, even supposing that all officers under sect. 58 must have been annual officers, it does not touch the present question. Then, does the office appear to be limited to a year by the nature of its duties? The duty is to collect the borough rate, which is not an annual tax like the poor rate, but is only to be levied occasionally as required. Therefore, there is nothing in that to point to an annual appointment, and it would be absurd to say that this falls within the class of corporate officers who must be appointed on the 9th of November in each year. I say nothing about the bond being illegal.

WIGHTMAN, J. The question raised is whether this is an office for one year and no more, as alleged in the plea, notwithstanding the terms of the appointment as recited in the condition of the bond. If this had been an officer appointed under sect. 58 of the 5 & 6 Will. 4, c. 76, I should have felt considerable doubt whether Mr. Willes's argument ought not to have great weight. But it seems that this is not the case, and that such an officer could not be appointed under the original Municipal Act, but that the 7 Will. 4, & 1 Vict. c. 81, was necessary to be passed for the purpose. The duties of such an overseer may be quite inconsistent with those of an annual office, and, therefore, we cannot say it is necessarily an annual office. The parties having chosen to enter into this bond are bound by terms of the condition, and are, therefore, liable upon the state of facts on the record.

ERLE, J. The defendants' testator expressly contracts to be surety for Robbins during all the time that he should act as such overseer. According to the plain words of this contract, the defendants ought to be liable for the default alleged. We must carry into effect the intention of the contracting parties according to the ordinary meaning of the words used by them, unless the law points clearly to another construction. The defendants' contention is, that although Robbins is stated in the contract to have been appointed during the pleasure of the council, in point of law he was to hold the office

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only for one year. But it is clear for the reasons already assigned that he was not appointed under the 5 & 6 Will. 4, c. 76, neither are the duties which are imposed upon him such as are confined to a single year. Therefore, on both grounds, the defence fails.

Judgment for the plaintiffs.

REGINA v. THE MAYOR, &c., OF BRADFORD.¹

Bail Court, Hilary Term, January 17, 1851.

Municipal Corporation — Election of Aldermen — Minority proceeding to an Election — Mandamus.

At a meeting of the town council a minority of the councillors present delivered voting papers to the mayor for certain persons to be elected aldermen. The mayor and the majority of the town councillors had been advised that the day was not the proper one for the election. The mayor consequently declined to proceed with the election, and no election was declared. It was, in fact, the duty of the council to have proceeded to the election of aldermen on that day, had they known the law:—

Held, that the act of the minority was not the act of the town council; that the election had not been part held, but that there had been no election; and that, consequently, a *mandamus* might issue calling upon the council to proceed to elect aldermen.

THIS was a motion for a *mandamus* to the mayor and town council of Bradford, to proceed to the election of seven aldermen to supply the places of the seven who went out of office on the 9th of November, 1850.

At the quarterly meeting of the council, held on the 9th of November, 1850, "for electing a mayor, appointing committees, and other general business," after the election of a mayor, a councillor, named Mark Pickup, delivered to the mayor a paper purporting to be a voting paper for seven persons as aldermen, saying, "I tender it as a voting paper for seven aldermen, in place of those who now go out of office by rotation." The mayor read the paper. Six other councillors immediately afterwards delivered to the mayor similar voting papers for the same persons. The mayor delivered these voting papers to the town clerk, who read them aloud, and then stated to the mayor that according to the opinion of an eminent barrister, the election of aldermen which had taken place on the 9th of November in the previous year was a right election, and that consequently the next election for aldermen would not take place until November, 1852. Shortly afterwards, voting papers were handed to the town clerk, by twenty-four other councillors, for a different list of persons to be elected aldermen. These the town clerk read aloud and handed to the mayor, stating that what he had said respecting the first set of voting papers applied equally to these. Thereupon the mayor, acting upon the opinion of the town clerk, did not make any declaration as to the result of the election, but refused to proceed

¹ 20 Law J. Rep. (N. S.) Q. B. 226.

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to an election at all; nor was any election of aldermen held or proceeded with upon that day, except as is above stated. The proposal to elect aldermen on that day, by Mark Pickup and the six others, took the council by surprise, (no notice of their intention having been given.) The twenty-four councillors who voted for a different list of persons did so as a matter of precaution in consequence of the step taken by the others. The council consists of forty-two councillors. It was subsequently ascertained that the 9th of November, 1850, was the proper day on which seven aldermen ought to have retired and seven new ones ought to have been elected.

Hall showed cause on behalf of three of the burgesses. It is agreed on both sides that seven aldermen ought to have gone out of office on the 9th of November, 1849, and seven more on the 9th of November, 1850. But it is submitted that the present application is wrong; that the motion ought to have been, not for a *mandamus* to hold the election, but for a *mandamus* to complete the election, if such a *mandamus* could be granted. The stat. 5 & 6 Will. 4, c. 76, s. 25, 69, appoints the 9th of November as the day on which the quarterly meeting is to be held, and on which the elections of mayor and aldermen are to take place; the latter section showing that no notice need be given of the business which is to be transacted at such quarterly meeting. In the stat. 7 Will. 4, & 1 Vict. c. 78, s. 14, was inserted for the purpose of pointing out the mode of election. Voting papers for the choice of aldermen were to be delivered to the mayor by the councillors present. The election of aldermen was commenced by Pickup delivering the voting paper to the mayor, who read it. If no other voting papers had been duly delivered, the voting paper of Pickup alone would carry the election. Six others were delivered duly to the mayor, in favor of the same candidates. The twenty-four voting papers delivered to the town clerk could not, it is apprehended, be counted as good votes, for the voting papers are to be delivered to the mayor, not to the town clerk; and some of those voting papers were bad on other grounds also. It is true, that the mayor refused to proceed with the election on the advice of the town clerk, but it is not within the province of the mayor to proceed or to refuse to proceed with an election of aldermen. That lies with the council. As soon as a councillor delivers a voting paper, the election has commenced. The mayor has no other office to perform except that of chairman when present. In that capacity he has to examine the votes, and to declare the election. If that declaration be not an essential part of the election, the office is full by the election of the seven voted for by Pickup. Suppose all the members of the council had voted for the same candidates, it could not be contended that the mayor alone, by refusing to proceed with the election, could render the proceedings null. If he could not in such a case, he cannot in this. The *mandamus*, therefore, should be to take up the proceedings where left off, and to complete the election by summing up the good votes, and declaring the elections.

[*Erle, J.* It must be taken that the majority of the town council

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did not intend to hold an election of aldermen on that day. Do you contend that an individual councillor can make it an election by delivering a voting paper?]

The statute prescribes the time for proceeding to an election. It is not necessary that the council should pass any resolution that they will proceed to an election. Pickup complied with all the requisites of the statute. If the others do not choose to vote, the election by those who do choose to vote is good. *Oldknow v. Wainwright*, 1 W. Black. 229; s. c. 2 Burr. 1017. *Gosling v. Veley*, 7 Q. B. Rep. 406; s. c. 16 Law J. Rep. (N. S.) Q. B. 201.

Crompton and Milward, contra, in support of the rule. This is a case for which the statute expressly provides. There has been no election. There was no intention to proceed to an election on the part of any except Pickup and the six others. Their proceeding took the others by surprise. The mayor could not now go on or proceed with the election. If the election be not completed on the election day, the only remedy is by *mandamus* for a fresh election under the statute. *The Queen v. The Corporation of Carmarthen*. Rawlinson on Corporations, 64. The majority did not intend to elect, but they did not refuse to elect wilfully against the law, as in *Gosling v. Veley*. They acted under mistake. There is no assertion of a right to proceed to an election on the part of the minority so as to make the election a good election. If it be an election, the twenty-four voting papers would carry the election of their list, for delivery of the voting papers to the town clerk in the presence of the mayor is the same thing as delivering them to the mayor. If there be not a complete election there is no election, and the statute applies. Rawlinson on Corporations, 337.

Cur. adv. vult.

ERLE, J., now said: It appears to me that the rule ought to be made absolute. The construction of the charter, taken in connection with the Municipal Corporations Act, was agreed upon between the counsel on both sides. The only question was, whether the election had been part held. It appears to me that it was the duty of the town council to have proceeded to an election on the day in question, had they known the law. They had been advised that they ought not to hold the election, and, therefore, they determined not to hold the election on that day. The minority claimed to proceed to an election. It appears to me that the act of the minority is not the act of the town council, and that the town council did not proceed to an election. The case falls therefore within the provisions of sect. 26 of the stat. 7 Will. 4, & 1 Vict. c. 78, which enacts, that when the charter day is gone by without an election, this court may award a *mandamus*, calling upon the parties to proceed to an election.

Rule absolute for mandamus.

Regina v. Green & others.

REGINA v. GREEN & others.¹

Bail Court, Hilary Term, January 29, 1851.

Bastardy — Order of Maintenance — Excess of Jurisdiction — Bad in Part and good in Part.

An order of maintenance ordered a person, as putative father, to pay a weekly sum for the maintenance of a bastard child from the birth of the child. As the application for the order was not made until more than two months after the birth, the order was clearly bad as to the period between the date of the birth and the time of applying for the order. Notice of abandonment of all claim under the order for payment anterior to the date of the order had been served on the putative father:—

Held, that the order was valid, and might be enforced against the putative father in respect of the weekly payments which became due after the date of the application to the magistrates.

THIS was an application, made the 19th of January, 1851, for a rule, calling upon John Green and Edward Moore, justices, &c., and Thomas Darby, to show cause "why the said two justices should not issue their warrant for distress and sale of the goods and chattels of the said Thomas Darby, for the arrears of weekly payments of 2s. 6d. per week directed to be paid to Elizabeth Coley, by an order under the hands and seals of two justices, made on the 4th of June last, adjudging the said T. Darby to be the putative father of a bastard child born of the body of the said Elizabeth Coley, single woman, accruing due since the 14th of May, 1850, the day on which the application for the said order was made by the said E. Coley to the said justices."

The facts were these: On the 25th of February, 1850, Elizabeth Coley gave birth to a bastard child. On the 14th of May following, she applied to the above-mentioned justices for a summons against T. Darby. On the 4th of June the justices, after hearing the case, made an order, which it was the object of the rule to enforce. The order was dated the 4th of June, 1850. It recited that Elizabeth Coley, single woman, on the 14th of May, applied to John Green, &c., for a summons to T. Darby, she having within twelve calendar months prior thereto been delivered of a bastard child, of whom she alleged Thomas Darby to be the father; that the justices issued their summons to T. Darby to appear at the petty sessions on the 29th of May; that the case was adjourned until the 4th of June; that Darby attended by his attorney. It then proceeded to adjudge that T. Darby was the putative father of the child, and ordered him to pay unto E. Coley, &c., "the sum of 2s. 6d. per week from the birth of the said child until the said child shall attain the age of thirteen years or shall die, or the said E. Coley shall marry. And we do further order the said T. Darby to pay to the said E. Coley the sum of 2l. 13s., being the costs incurred in obtaining the order."

The defendant Darby did not obey the order, and the justices refused to issue their warrant of distress for the arrears, on the ground

¹ 20 Law J. Rep. (N. S.) M. C. 168.
17 *

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that they had no power to order maintenance anterior to the date of the application, the application not having been made within two months after the birth.

The mother, previously to demanding the arrears, had served T. Darby with a notice abandoning all claims arising upon the order for any weekly payments anterior to the 14th of May, the date of her application.

Archbold showed cause. The justices were warranted in refusing to enforce the order of maintenance, as it was bad in law. The application for the order of maintenance was made more than two months after the birth of the child, therefore the justices had no authority, under the statute 7 & 8 Vict. c. 101, s. 3, (the section giving power to order maintenance) to direct the putative father to pay maintenance from any period anterior to the date of the application. This order, therefore, which directs the payment of maintenance from the time of birth, is clearly bad as to the period between the birth and the date of application. It is submitted that, being bad in part, it is bad altogether. It will be said that the order may be good for the period beyond the date of the application, and *The King v. Maulden*, 8 B. & C. 78; s. c. 6 Law J. Rep. M. C. 76, will be relied upon. The order in that case was for by-gone as well as prospective maintenance of a lunatic pauper. No argument was raised in that case as to the power of the court to quash the order in part and to hold it good in part. The case of *The King v. St. Nicholas, Leicester*, 3 Ad. & E. 79; s. c. 4 Law J. Rep. (n. s.) M. C. 97, where there was a similar order, proceeded on the authority of the previous decision. To hold an order good in part and bad in part, is, in effect, to amend the order. The sessions have no power to amend without express authority. To give the court of sessions such a power as to matters of form even, it was found necessary to pass the stat. 5 Geo. 2, c. 19.

M. D. Hill, in support of the rule. A large class of cases has decided that an order of justices may be good in part and bad in part. If upon the face of the order the court has the means of seeing what part is good and what part bad, the maxim *utile per inutile non vitiatur* applies, and the order will be sustained by the court as to the good part. *The King v. Maulden*; *The King v. St. Nicholas, Leicester*; *The Queen v. Stoke Bliss*, 6 Q. B. Rep. 158; s. c. 13 Law J. Rep. (n. s.) M. C. 151; and *The Queen v. Winster*, 19 Law J. Rep. (n. s.) M. C. 185, expressly support that proposition. Notice had been given that all claim for maintenance previous to the date of the application had been abandoned.

(He was here stopped by the court.)

ERLE, J. It seems to me that the doctrine is established by the three cases which have been cited — *The King v. Maulden*, *The King v. St. Nicholas, Leicester*, and *The Queen v. Winster* — that this court, exercising its appellate jurisdiction, will, if they can clearly sever the bad part of an order from the good, quash the order for the bad part,

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and leave it to stand as to the residue. The case of *The Queen v. Stoke Bliss*, which at first sight appears to be against the rule, that the order may be good in part and bad in part, in reality confirms it. The order in that case, which was bad as to the judgment, was held not maintainable as to the costs, but was quashed as bad altogether, on the ground that the giving of costs was merely ancillary to the judgment, and that the two parts of the order could not be clearly severed. But the very distinction which the court points out in that case is an adjudication that the principle is a true one, and that where the line of demarcation can be clearly pointed out, (as it is in this case,) the order may be supported as to the good part. I do not think that it was necessary for the woman, who gave notice that she had abandoned all claim under the bad part of the order, to have it brought up by *certiorari* for the purpose of having it quashed as to that part, and I am of opinion that I am warranted by the decisions referred to in making this rule absolute. This seems to me to be in the nature of a civil action for the recovery of a sum of money. There has been an improper refusal to pay. The applicant has been put to the costs of this proceeding in order to get her money. The rule, therefore, must be made absolute, with costs against the putative father.

Rule absolute accordingly.

HUSH v. LONG.¹

Bail Court, Easter Term, May 6, 1850.

Costs — Suggestion under County Court Act, 9 & 10 Vict. c. 95, to deprive Plaintiff of his Costs — Bill of Exchange — Indorsee against Drawer — Notice of Dishonor — Material Part of the Cause of Action — Immateriality of Plaintiff's Knowledge where Cause of Action arose.

An action was brought by a second indorsee of a bill of exchange against the drawer. It was shown that the bill of exchange was drawn and indorsed, and notice of dishonor given, within the jurisdiction of the county court within which the defendant dwelt. On motion to enter a suggestion to deprive the plaintiff of his costs under sect. 128 of the County Court Act:—

Held, that the cause of action arose in some material point within the jurisdiction of the county court:—

Held, also, that if a bill of exchange is drawn and indorsed within the jurisdiction of the county court, an indorsee is not at liberty to sue in the superior courts, by reason of his not knowing where the bill was drawn and indorsed.

This was a rule calling upon the plaintiff to show cause why a suggestion should not be entered on the roll in order to deprive the plaintiff of his costs under the County Court Act, 9 & 10 Vict. c. 95. The action was brought by the plaintiff, as second indorsee of a bill

¹ 15 Jur. 511.

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of exchange under 20*l*., against the defendant, as the drawer. Upon the trial, the plaintiff obtained a verdict for the amount claimed. The affidavit in support of the application stated, in reference to the question as to where the cause of action arose, that the bill in question was drawn and indorsed at the defendant's own residence, being within the limits of the county court which had jurisdiction over the district where he resided; that it was then delivered by him to a third person in order to get it discounted; and that notice of dishonor of the bill was given by the plaintiff to the defendant within the same jurisdiction. It did not appear that any issue was raised upon the validity of the notice of dishonor. The affidavit then negated the exceptions in the 128th section of the above statute.

Lush showed cause. This is the case of a remote indorsee: it is not like the case of an immediate indorsee. The question is, whether it can be said to be a case within sect. 128 of the County Court Act. How was it possible that the plaintiff should know where the defendant drew and indorsed the bill? The means of knowledge was not in his power. He could not possibly be aware that the county court had jurisdiction. It is submitted that the intention of the powers of that section of the statute, which deprives a plaintiff of his costs, was, that where a material part of the cause of action was known to the plaintiff to have arisen within the jurisdiction, that then that section should apply. It could never have been intended that it should apply, where a party had no knowledge of the fact of the cause of action having arisen within the jurisdiction of the county court, and sues in the superior court; the depriving a plaintiff of his costs under such circumstances is in the nature of a penalty, and ought to be construed with strictness. Unless a party has wilfully infringed that portion of the act, he ought not to suffer. Although notice of dishonor may have been given within the jurisdiction of the county court, it does not appear from the affidavits that any issue was raised on that point. It cannot, therefore, be said that this is a case coming within the meaning of the words "some material point."

Gray, in support of the rule. Notice of dishonor was a material part of the cause of action. The defendant is sued as the drawer of a bill of exchange. In order to give the plaintiff a right of action, notice of dishonor must have been given by the holder, who, in this case, was the plaintiff. It cannot be contended that this is not a "material point." It is most likely that the question was in issue. It was the duty of the plaintiff to have proceeded in the county court; but assuming that no question was raised about the notice of dishonor, it was impossible for the plaintiff, before action brought, to say that the question as to the validity might not arise. It is shown that the bill was drawn and indorsed within the jurisdiction of the county court; but if that should be considered immaterial, the plaintiff at all events was fully aware within what jurisdiction notice of dishonor was given. [He was then stopped by the court.]

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COLERIDGE, J. I should be very sorry to introduce into this clause the restriction Mr. Lush seeks to put upon it, because it would cause great difficulties in a vast number of cases. Nothing is said in the act of Parliament at all respecting the knowledge a plaintiff may possess of the place where the cause of action arose. It is, I think, enough if the cause of action does in fact arise in some material point within the jurisdiction, to entitle the party seeking to enter the suggestion to have his rule made absolute, whether the plaintiff has knowledge of the fact or not. Here it was a material part of the cause of action that the defendant should have notice of the non-payment of the bill by the acceptor. That notice was given by the plaintiff to the defendant at his residence; this the plaintiff must be taken to have known. It is clear, therefore, that the rule for entering the suggestion must be made absolute.

Rule absolute accordingly.

BAILLY & another v. CURLING.¹

Bail Court, Hilary Term, January 30, 1851.

Arbitration — Award — Certainty — Directing Defendant to pay Costs — Attachment — Delay in applying to Court — Demand by one of two Plaintiffs.

An award made in an action, in which A and B were plaintiffs, and C defendant, ordered that the defendant should pay the plaintiffs a certain sum of money, and directed that the defendant should pay the costs of the reference and award, (not saying to whom the costs were to be paid.) After more than two years from the making of the award, one of the plaintiffs demanded payment of the amount awarded from the defendant. The defendant did not pay. —

Held, that the plaintiffs were entitled to an attachment to compel payment, although the plaintiffs had given no explanation of the delay in coming to the court: —

Held, also, that the direction in the award as to the costs was sufficiently certain, as the award could not reasonably be construed to mean that the defendant should pay costs to any one but the plaintiffs: —

Held, further, that the demand made by one only of the two plaintiffs was a sufficient demand to bring the defendant into contempt.

THIS was a motion for an attachment against the defendant for not paying certain sums of money, pursuant to an award and the *allocatur* of the master.

By a judge's order, an action by the two plaintiffs against the defendant, and all matters in difference between them, were referred to arbitration. The award ordered the defendant to pay a certain sum to the plaintiffs, and also that the defendant should pay the costs of the action, &c., and that each of the parties should pay one moiety of the costs of the award. The plaintiff took up the award, and obtained the master's *allocatur* for the costs of the action and half the costs of the award. The award was made in April, 1848,

¹ 20 Law J. Rep. (N. S.) Q. B. 235.

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and no circumstances were stated in the affidavits to explain the reason why the attempt to enforce the award had not been made before. The demand of payment was made on the defendant by one of the plaintiffs alone in July, 1850. The affidavits did not positively negative the fact of the defendant having paid the amount due to the other plaintiff; but the plaintiff who made the demand swore that the amount had not been paid to him or his attorney, or to any one on his behalf.

Lush now showed cause. An attachment, it is submitted, will not be granted in this case. The lapse of time, without any explanation being offered why the party has not come to the court before, precludes the party from obtaining this summary process. *Storey v. Garry*, 8 Dowl. P. C. 299. Secondly, the award does not order the defendant to pay the costs to the plaintiff. It merely says he is to pay costs. *Scott v. Williams*, 3 Dowl. P. C. 508. Thirdly, the demand by one plaintiff alone is insufficient. The defendant may have paid the other plaintiff the full amount due. In an action, where there were three plaintiffs, the defendant was ordered by an award to deliver a bond to the plaintiffs. One only made the demand upon him, and Tindal, C. J., held the demand insufficient, saying that the demand ought to be by all three plaintiffs, or by a person authorized by a power of attorney from all three. *Sykes v. Haigh*, 4 Dowl. P. C. 114.

Bass, in support of the rule. First, the delay in this case of two years and three months is not, according to any principle of law or practice of the courts, sufficient to require the plaintiffs to give any explanation of the cause of it, so as to preclude them from making this application. The application was made promptly enough after the demand was made. Secondly, the award which orders the defendant to pay the costs can have no other meaning than that he should pay the costs to the plaintiffs. Thirdly, an award of a delivery of a bond is very different from an award of payment of money.

[*Master Bunce*. The practice has been that a demand made by one of two plaintiffs of the sum due under an award has always been considered sufficient, if it appears substantially on the face of the affidavit that the other plaintiff has not been paid.]

ERLE, J. On two of the objections I have had no doubt. A person who has had an award made in his favor does not lose his right of applying to the court to enforce it by attachment, by such a delay as has taken place here. Secondly, the direction to pay the costs seems to me sufficient. The words of the award, "that the defendant should pay the costs," are incapable of any other sensible meaning than that he shall pay them to the plaintiffs. It is absurd to suppose that he is to pay them to any one but the plaintiffs. Whether the demand by one of the two plaintiffs alone be sufficient, is a point on which I have felt some hesitation. The only case that is to be found on the point is the case of *Sykes v. Haigh*. That case

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seems to me to be an exceptional one. Chief Justice Tindal, I take it, does not lay down as a proposition of law that a demand to be good must be by all three plaintiffs. The practice, I am told by the master, is contrary to any such supposed rule. As payment to one plaintiff would be sufficient, I am of opinion that it is not necessary that the demand should be by more than one. The rule, therefore, must be made absolute.

Rule absolute.

 JOHNSON v. LATHAM.¹

Bail Court, Hilary Term, January 31, 1851.

Arbitration — Award — Arbitrator — Certainty — Award incorporating Map with descriptive Words — Setting out Pleadings in Award — Reference back — Award without hearing Parties — Costs of second Reference — Allocatur under first Award null.

An arbitrator had to decide upon the depth at which the defendant was entitled to keep a weir which penned back the water of a river so as to interfere with the plaintiff's mill higher up the stream, and to determine all manner of rights of water between the parties. The arbitrator awarded that the defendant was entitled to maintain his weir to the depth of fourteen inches and no more, and added that he had caused marks to be placed, which marks pointed out the depth the defendant was to keep his weir, and that a plan annexed to the award correctly defined and described the depth of the weir and the marks:—

Held, that the award sufficiently pointed out the depth of the weir, and was sufficiently precise, although it made no provision for the case of floods, or for regulating the depth of the paddle in the defendant's weir, by which the water could be let off.

There were figures on the plan which referred to written descriptions at the foot of the plan, delineating certain places. Without these descriptions the plan was unintelligible:—

Held, that these written descriptions were part of the plan and incorporated with the award.

An action on the case for obstructing the plaintiff's right to the water was one of the matters referred:—

Held, that it was not necessary to set out the pleadings in the award.

By the submission, the costs of the reference and award were in the arbitrator's discretion, and there was also a clause empowering the court, in the event of any application being made to them, to send the matters referred, or any of them, back to the arbitrator for reconsideration. The original award, after deciding all matters in difference, added, that for the better defining the height of the weir such permanent marks should be placed as B. should direct. This direction being held bad as a delegation of authority, the court remitted the award to the arbitrator for the purpose of reconsidering the prospective directions that should be given for the purpose of defining the depth at which the defendant might maintain his weir. The arbitrator, without calling the parties before him, made a new award, repeating *verbatim* the terms of the old award, that the plaintiff should pay the costs "of this my reference and of this my award," and as to all other matters, except as to the prospective directions, on which he awarded as above stated:—

Held, that the arbitrator had adopted a proper course in making a new award, repeating the old adjudication as to the matters not sent back to him, and the adjudication on the matters remitted for consideration:—

Held, also, that it was not necessary for the arbitrator to give the parties an opportunity of being heard before him, either with respect to the prospective directions, or with respect to the costs of the second reference and award, as incidental thereto.

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Semble, where the submission places the costs of the reference and award in the discretion of the arbitrator, and contains a clause giving the court power to remit the matters or any of them back to the arbitrator, and the award is sent back to him on any point, without any new direction as to costs, the arbitrator has a discretionary power over the costs of the second reference and award.

The costs had been taxed before the original award was sent back. After the second award was made, the defendant demanded the same costs without any new taxation:—

Held, that by the reference back the *allocator* became null, and that there ought to have been a fresh taxation of costs after the making of the new award, before any demand for costs could be enforced.

In this case there were cross motions.

The defendant had obtained a rule *nisi* for payment of the costs, pursuant to an award and the master's *allocatur*.

The plaintiff moved for a rule *nisi* to set aside the award.

The circumstances connected with the award are set out in the report of the previous proceedings in this court respecting it, when the court remitted the award to the arbitrator, to reconsider the prospective directions given in the award. See 19 Law J. Rep. (N. S.) Q. B. 329.

By the original submission, the costs of the reference and award were in the discretion of the arbitrator.

The arbitrator made a new award, without calling the parties before him or giving them any notice that he was about to make his award. The new award repeated *verbatim* the terms of the original award, except as to the prospective directions. It repeated the terms of the award, ordering the costs of the reference and award to be borne by the plaintiff. As to the matters on which it was sent back the award was as follows: "And whereas I have reconsidered such directions, and have caused to be placed certain marks and erections near to the said weir, showing the depth at which the defendant is entitled by my said award to maintain the said weir, now I do award and declare that the said marks and erections so caused to be placed by me as aforesaid do correctly denote and define the depth at which the defendant is entitled by my said award to maintain the said weir. And I further award and declare that the map or plan hereunto annexed and signed by me defines and describes the depth of the said weir and the said marks and erections so caused to be placed by me as aforesaid for pointing out, perpetuating, denoting, and defining the same; and I do further order that the costs and charges incurred by placing the said marks and erections be borne by the defendant, and that they be forever hereafter kept in repair and maintained by the defendant."

The map or plan contained figures referring to written descriptions at the foot of the map of the places delineated upon it, and without such description the map was unintelligible. In the defendant's weir it appeared by the affidavits that there was a paddle, by means of which the head of water could at any time be reduced. It was also shown that at certain times the river was subject to floods.

The costs had been taxed by the defendant, and the master's *allocatur* obtained for 172*l.* before the original award had been sent back to

the arbitrator. There had been no new taxation of costs since the making of the new award; but after the new award was made, the defendant made a proper demand on the plaintiff for payment of the amount under the master's *allocatur*, duly serving the plaintiff at the same time with the old documents and the rule referring the matter back and the new award and plan.

Watson, in support of the application to set aside the award, (January 21.) First, the arbitrator has not defined what is to be the amount of the penning back of the stream. The award does not sufficiently define the height of the weir or the head of water the defendant is entitled to keep. There is a paddle in the weir, by means of which the head of water can be reduced. The quantity of water varies. The river is higher in flood times than in its ordinary state. Secondly, as the reference was a reference back for the arbitrator to reconsider the prospective directions which he had given for the purpose of defining, denoting, and perpetuating the limit and depth at which the defendant was to keep his weir, the arbitrator ought to have called the parties before him and given them an opportunity of offering evidence or making observations upon the case, before exercising his judgment and making his new award; especially as he gave directions as to costs in the new award.

Watson, *Bramwell*, and *T. Jones* (January 28) showed cause against the rule, calling upon the plaintiff to pay the costs pursuant to the award and the master's *allocatur*. The costs have not been duly taxed. The costs were taxed on the first award, which was sent back to the arbitrator. There has been no taxation of costs since the second award was made. If the master were to tax the costs now, he might possibly award a different amount. Whatever he may have done under the old award, he would not allow the same amount of costs in respect of Bellhouse's services. At the time the master taxed the costs he had no jurisdiction, for the award was bad.

[*Erle*, J. It was not adjudged bad. It was only sent back to the arbitrator on one point.]

After it was so sent back, there was no existing award until the new award was made.

[*Erle*, J. What became of the award as to the residue of the matters which were not sent back, pending the second reference? It seems to be in a manner suspended.]

The question of award or no award is as it were suspended until the second award is made. The statute of limitations would run only from the date of the new award, supposing an action were brought for the costs. The award must speak from the time when the whole award is perfected. The arbitrator has in his new award given the defendant the costs of the reference and award. Probably, the effect of the clause in the submission as to costs is to give the arbitrator power to award as to the costs of the new award. If so, it is clear that there must be a new taxation; and if the amount of the costs now sought to be obtained were paid to the defendant, he

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might come again for further costs of the reference and award under the terms of the second award. In the case of a new trial, the master has to exercise his judgment a second time as to what costs are to be allowed. Whether the defendant's right to costs is limited to costs under the old award, or whether it extends to the costs of the second reference either by virtue of the submission or of the reference back, there ought, it is apprehended, to have been a second taxation of costs. The first award was invalid. There was a delegation of authority on the part of the arbitrator. There can be no taxation of costs under an invalid award. The case is very different from one where the award is valid, and it is sent back as to a matter in order that the party in whose power it is may have the full benefit of the submission.

[*Erle, J.* Suppose an award good as to three points, and bad as to the fourth, and sent back as to that alone, as at present advised, I am of opinion that the arbitrator is *functus officio* as to the three, and cannot alter his judgment as to them.]

The arbitrator must re-award his previous award as to them, or the old award may stand as to them after the new award is made. If the arbitrator had no power to give costs as to the second reference, the second award is bad on that ground. The award is unintelligible as to the provision respecting the depth of the weir. *Nickalls v. Warren*, 2 Dowl. & L. P. C. 549; s. c. 14 Law J. Rep. (n. s.) Q. B. 75; and *Stonehewer v. Farrer*, 14 Law J. Rep. (n. s.) Q. B. 122.

[*Erle, J.* I have never read that case of *Stonehewer v. Farrer* with much satisfaction. I think the award denotes the height of the weir very clearly and precisely.]

The award defines the height of the weir by reference to certain marks described in the map or plan annexed. That plan is perfectly unintelligible without reference to the written description on the face of the plan. The award does not incorporate the words in the map as part of the award.

[*Erle, J.* Surely the words on the face of the map are part of the map. There can be no doubt that the arbitrator meant them to be read as part of the map.]

The pleadings ought to have been brought before the court. They ought to have been set out in the award, that the court might see that there had been a proper adjudication on the issues.

[*Erle, J.* There is nothing in that objection. It is not necessary to transcribe the pleadings in the award. The court will presume that they have been properly adjudicated upon, unless the contrary be shown.]

This application is too early. The award was made only last term. The plaintiff has the whole of this term in which to move to set it aside. The defendant cannot move to enforce it until the time for setting it aside has elapsed. *Jones v. Ives*, 1 L. M. & P. 689; s. c. 20 Law J. Rep. (n. s.) C. P. 69; 2 Eng. Rep. 382.

Welsby and *Whitmore*, in support of the rule, calling upon the plaintiff to pay the costs. It is not necessary that there should have been

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any fresh taxation of costs after the new award was made. The costs sought are those under the first award, and as to which the second award is silent. The first award was not bad *in toto*. The award was held bad as to putting up certain marks. These the arbitrator was not bound to award upon. He had determined all the rights of the parties before adding the direction respecting the marks. The second award speaks only from the time of the date of the reference back; therefore, if the defendant cannot get his costs except under the second award, he cannot get the costs of the first reference and award at all. No more costs are imposed on the plaintiff by the new award than before. When an award is referred back as to some matters, the true position it is apprehended is this, that the first award is suspended until the second is made; but when that is made, the first speaks from the time of its date as to all the matters which have not been referred back, and the second from the time of its date as to those which have been sent back for consideration. The arbitrator has to amend what is defective, and the two documents form but one award. Watson on Awards, 139, 3d ed.

[*Erle, J.* It appears to me that the arbitrator has done what was correct. He has gone over the part of the award which he was not to alter as it were with a dry pen; that is, he has re-awarded it. If an action were brought, and it were necessary to set out the award, it would be very complicated and confused to set out every proceeding, and then to say that they altogether make one award.]

Assuming that view, that the second award is the substantive award, still the taxation was regular.

[*Erle, J.* Where the submission contemplates the possibility of an original and supplementary award, and gives the arbitrator discretionary power over the costs of the reference and award, and it is referred back to him to reconsider a prospective direction, and the rule referring it back is silent as to costs, it seems to me that the clause in the submission as to costs gives the arbitrator power over the costs of the second reference; for the second reference is a part of the reference, or rather, a continuation of the reference.]

Secondly, this application is not too early. The party in whose favor an award is made has a right to come at once and enforce it. He need not wait until the time for setting aside the award has expired. This rule is clearly laid down in *Doe v. Amey*, 8 Mee. & W. 565; s. c. 10 Law J. Rep. (N. S.) Exch. 466. The case of *Jones v. Ives* is not satisfactory. At any rate, it must be confined to the case of a reference by order of *nisi prius*. This reference was by agreement.

Cur. adv. vult.

ERLE, J., now said: On a motion for a rule *nisi* to set aside an award, it was argued that the award was uncertain and defective; but upon the affidavits it appears to me to be sufficiently certain in respect of the height of the defendant's weir, and of the map or plan of that weir annexed to the award, and that it is not defective for omitting to make provision for floodwaters and for regulating the depth of the paddle. As the award is silent on both of these latter subjects, it is in

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effect decided that the arbitrator did not impose upon the defendant any obligation towards the plaintiff in respect of either of them. It was further objected, that the parties ought to have been heard upon the matter referred back, and upon the costs of reference and award incidental thereto, and that the omission of the arbitrator so to do rendered the award void. But as the principal matter referred back was confined to the prospective directions to the defendant relating to the weir, it may well have been that the arbitrator required no further evidence or discussion; and if so, it was not necessary to hear the parties again, either on the principal matter referred back, or on the costs as incidental thereto.

Rule refused.

In the same case, on showing cause against a rule *nisi* for the payment of the costs on the master's *allocatur*, it was objected that the *allocatur* was void, because it was made before the last award, and it was argued that a reference back of one of several matters referred, by virtue of an order of reference authorizing the court so to do, renders the first award inoperative, and that although the arbitrator might not alter his first award upon any matter not referred back, still he must make a fresh award repeating the first award as to those matters, and deciding anew that which was so referred back; that the discretion of the arbitrator over the costs of the reference and award is to be exercised at the close of the reference, and at the time of making the award; and that as the first award so became null by the reference back, the *allocatur* made thereon was also null. It seems to me that this argument ought to prevail, and that the rule must be discharged. But as the arbitrator has pursued the same course, and as upon the facts of this case it appears that a reference back as to the future directions to the defendant would not be likely to affect the award of the costs of the rest of the reference, and as the last award appears to me to be so expressed as to give the same costs of reference and award as had been given by the first award, this objection to the *allocatur* is formal merely, and the rule must be discharged without costs.

Rule discharged.

WEST v. JACKSON & another.¹

Hilary Term, January 17, 1851.

Pleading — Declaration — Express Promise — Good Consideration — Arrest of Judgment.

Declaration stated that heretofore, to wit, &c., in consideration that the plaintiff then, through placing confidence in the defendants that they were then acting fairly by the plaintiff in then recommending the plaintiff to purchase of the defendants on their recommendation 211 pockets of hops at 63s. the cwt., the defendants promised the plaintiff that they were not then abusing the said confidence of the plaintiff, in recommending the purchase at the said price; that the plaintiff, relying on the said promise, did then, to wit, on the day and

¹ 20 Law J. Rep. (N. S.) Q. B. 240.

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year aforesaid, through placing confidence in the defendants that they were at the time of the said promise acting fairly by the plaintiff in then recommending him to purchase at the said price, purchase of the defendants on their recommendation at the said price. The declaration then alleged that the defendants broke their said promise in this, that, at the time of making it, they were abusing the plaintiff's confidence in this, that at the time of their said recommendation the hops were worth only 50s. the cwt., as the defendants then well knew, by means whereof the plaintiff had sustained damage, &c. :—

Held, on motion in arrest of judgment, that the declaration disclosed a good consideration for the defendants' express promise.

ASSUMPSIT. The third count of the declaration alleged, that heretofore, to wit, on the 6th day of May, 1849, in consideration that the plaintiff then, through placing confidence in the defendants that they were then acting fairly by the plaintiff in then recommending the plaintiff to purchase of the defendants, on their said recommendation, divers, to wit, two hundred and eleven pockets of hops at the price of 63s. the cwt., the defendants promised the plaintiff that they were not then abusing the said confidence of the plaintiff, in recommending him to purchase the said hops at the said price; and the plaintiff avers that he, relying on the said promise of the defendants, did then, to wit, on the day and year aforesaid, through placing confidence in the defendants, that they were at the time of the making the said promise acting fairly by the plaintiff, in then recommending him to purchase the said hops at the said price, purchase of the defendants on their said recommendation the said hops at the said price, whereof the defendants had notice. Yet the defendants broke their said promise in this, that at the time of the making of the said promise they were abusing the said confidence of the plaintiff in this, to wit, that they then, for the sake of making an unfair profit out of the plaintiff, so recommended the plaintiff to buy the said hops at the said price, although the said hops at the time of the making the said promise were not worth that price, but a much less price only, to wit, 50s. a cwt., as they, the defendants, at the time of the making the said promise, well knew, by means whereof the plaintiff has sustained damage in this, that the plaintiff has paid 100*l.* parcel of the said price, and has rendered himself liable to pay the residue of the said price by accepting a bill of exchange, drawn by the defendants upon and directed to the plaintiff, for a large sum, to wit, the sum of 100*l.* 0*s.* 6*d.*, payable to the defendants or order, and which was so drawn and accepted as aforesaid, for and on account of the said price of 63s. the cwt.

To this count the defendants pleaded *non assumpsit*; and six other pleas, traversing several of the above allegations.

On the trial, before Pollock, C. B., at the Norfolk Spring assizes, 1850, a verdict was found in favor of the plaintiff, damages 79*l.* 5*s.*; and in the following Easter term a rule *nisi* was obtained to arrest the judgment, on the ground that the third count disclosed no sufficient consideration for the defendants' promise.

Crompton showed cause. There is no ground for the objection taken in arrest of judgment. All that is alleged formed one bargain, and if the words "then purchased" in the declaration mean, as they

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clearly do, a purchase concurrent with the defendants' promise, which must be taken to have been an express promise, a good consideration for such promise appears. This case does not fall within the principle of the decision in *Roscorla v. Thomas*, 3 Q. B. Rep. 234; s. c. 11 Law J. Rep. (N. S.) Q. B. 214. In *Thornton v. Jenyns*, 1 Man. & G. 166; s. c. 9 Law J. Rep. (N. S.) C. P. 265, where the declaration alleged that in consideration that the plaintiff *had* promised to the defendant, the defendant *then* promised the plaintiff, it was held that the promises might be considered as simultaneous, and therefore that there appeared to be a sufficient consideration. The words "through placing confidence" go to show still more clearly that the purchase and promise were contemporaneous. The count, therefore, is good. He referred also to *Williamson v. Allison*, 2 East, 446.

Worledge, (O'Malley with him,) contra. First, as to the consideration, the first thing alleged is, that confidence was placed in the defendants' recommendation.

[*Lord Campbell*, C. J. It appears to have been all one transaction.]

But that statement shows the sale was complete before the promise, therefore the consideration was a past one, and subsequent averments cannot help. The case of *Roscorla v. Thomas* shows that a past purchase is not a good consideration for a subsequent promise. Then as to the promise: all that is alleged amounts to no more than puffing. It is a mere matter of bargain, and both parties had equal means of judging as to price.

[*Lord Campbell*, C. J. The doctrine of *caveat emptor* would apply rather to the evidence than to the allegations upon the record.

Patteson, J. We must suppose now that the plaintiff bought the hops in consequence of, and relying upon, the defendants' recommendation.]

It was a warranty of price, if any thing, and ought to have been so declared upon.

LORD CAMPBELL, C. J. I think the count is good. The consideration cannot be said to be a past one. All that is alleged may reasonably be supposed to have been at one time and one transaction, although not *uno flatu*; the defendants recommending the hops, and the plaintiff, upon such recommendation and the assurance that there was no danger of his confidence being abused, buying them. Then, it is alleged that the plaintiff's confidence was abused; and that allegation, as we must now take it, having been proved, there appears to be a good consideration.

PATTESON, J. This is not an implied, but an express promise, and the making of such a promise upon such a consideration as that stated is quite possible, if the whole matter were contemporaneous, which no doubt it was, and we must now take it that all that is alleged was proved.

COLERIDGE and *WIGHTMAN*, JJ., concurred.

Rule discharged.

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THE AGRICULTURIST CATTLE INSURANCE COMPANY v. FITZGERALD.¹

Hilary Term, January 11, 1851.

Company — 7 & 8 Vict. c. 110 — Action for Calls — Complete Registration, Certificate of — Evidence — Deed — Erasure.

A joint-stock company, registered under 7 & 8 Vict. c. 110, cannot maintain an action for calls until they have obtained a certificate of complete registration, and a plea that they had not obtained such a certificate is an answer to the action. But this defence will not arise under a plea of never indebted, or a plea traversing that the plaintiffs were a completely registered company.

Where a deed is altered in a material part it ceases to have any new operation, and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire; but it may still be given in evidence to prove a right or title created by its having been executed, or to prove any collateral fact.

Where in an action of debt for calls, under 7 & 8 Vict. c. 110, s. 55, it appeared that the deed of settlement of the company had been executed by the defendant as a shareholder, but there was an unexplained erasure of the name of another person who had signed it as a shareholder, it was held that the deed might be given in evidence to prove the fact of the defendant being a shareholder.

Quære, whether such an erasure could in any mode affect the defendant's liability under the deed.

DEBT for calls. The declaration stated that "the plaintiffs being a company completely registered, and which before the commencement of the suit had obtained a certificate of complete registration, according to the 7 & 8 Vict. c. 110, complained of the defendant," and proceeded in the form given by that act.

Pleas — First, never indebted; second, that the plaintiffs were not a company completely registered according to the said statute *modo et forma*; third, that the plaintiffs were a company formed after the passing of the said act, but were not formed by any deed in writing under the hands and seals of the shareholders therein, as directed and required by the said act; fourth, that the plaintiffs were a company formed after the passing of the said act, but the deed by which the said company was formed did not contain the several requisite clauses and other articles directed and required by the said act.

The plaintiffs joined issue on the first and second pleas, and replied to the third plea, that they were a company formed by a deed in writing under the hands and seals of the shareholders, as directed and required by the said act; and to the last plea, that the deed by which the plaintiffs were formed did contain the several requisite clauses and other articles directed and required by the said act. On these replications issues were joined.

At the trial, before Wightman, J., at the sittings in Middlesex after Hilary term, 1850, the deed of settlement of the company being put in evidence, it appeared that the defendant had executed the deed for one hundred shares, but that immediately before his signature in the schedule there was an erasure, over which a name had been written. The witness who produced the deed stated that he

¹ 20 Law J. Rep. (N. S.) Q. B. 244; 15 Jur. 489.

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believed that a name had been inserted there erroneously, and that it had been erased subsequently to the time when the defendant executed the deed. In order to prove that the company was completely registered, a clerk from the registrar's office produced a book containing the entry of the complete registration on the 1st of September, 1845. He stated that he gave a certificate of complete registration to Mr. Hill or Mr. Meteyard, who were directors of the company, and that he had seen it since that time. The secretary proved that he had searched among the papers of the company for the certificate of complete registration, but was unable to find it. Upon this it was objected by the defendant, that as the certificate was not produced, and no secondary evidence of it given, there was no proof of complete registration of the plaintiffs as a company; and also that the deed was void by reason of the erasure. The jury returned a verdict for the plaintiffs, leave being reserved to the defendant to move to enter a nonsuit, or a verdict upon any of the issues. A rule *nisi* having been accordingly obtained, —

Sir F. Thesiger and *Willes* showed cause.¹ First, as to the erasure of the deed. This objection, if valid, cannot be raised in an action like this for calls. Sect. 55 of the 7 & 8 Vict. c. 110, provides that, if it is proved that the defendant is the holder of any share when the call became due, the company shall be entitled to recover. The erasure in the schedule of the name of another person cannot affect the liability of the defendant as a shareholder.

[*Lord Campbell*, C. J. The defendant says it renders the deed not admissible in evidence.]

That is not so. The schedule is no part of the deed. But even if this erasure does at all affect the validity of the deed, this is not an action on the deed, but founded on the liability of the defendant by reason of his being a shareholder, of which liability the deed is used as evidence. The effect of the deed is to incorporate the company, but as soon as it is incorporated, sect. 25 imposes a liability upon the individual members, and an action is given wholly irrespective of the deed. If the objection were valid, it would go to show that the company was not incorporated; but by the act it is made to exist independently of the deed, which is only one of the preliminaries required for complete registration. It is not like the case of an ordinary instrument *inter partes*. The defendant contracts with certain other persons before the formation of the company, and the principle recognized and acted upon in *Davidson v. Cooper*, 11 Mee. & W. 778; s. c. 12 Law J. Rep. (n. s.) Exch. 467, cannot apply here. Secondly, there was sufficient proof that the plaintiffs were a company completely registered within the terms of the second issue. There is nothing in the Joint-stock Company's Act which shows that the certificate is the only evidence of this. No doubt, it is provided as an easy and convenient mode of proof, but it does not supersede

¹ January 11, before LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and WIGHTMAN, JJ.

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other evidence. The entry of the particulars required by that act constitutes complete registration; and upon those returns being properly made, it is the duty of the registrar to grant a certificate that the complete registration has taken place. The certificate, therefore, cannot itself be the registration. The 25th section recognizes the existence of complete registration before the granting of the certificate. But, even supposing it to be the only evidence of registration, abundant proof of it was given. It was shown to have existed, and to have been given to one of two persons connected with the company. The proper place for its custody would be the office of the company, and search for it having been made there, secondary evidence was admissible. *M'Gahey v. Alston*, 2 Mee. & W. 206; s. c. 6 Law. J. Rep. (n. s.) Exch. 29. If so, the evidence given of its existence was sufficient. It is not to be presumed that it was taken out of the company's office.

Montagu Chambers and *James Wilde*, in support of the rule. First, the proof of there being any such company lawfully entitled to sue, failed; since a certificate of complete registration must, under the express words of sect. 7 of the 7 & 8 Vict. c. 110, be obtained before a company can act otherwise than provisionally, and by sect. 20, the power to make calls is positively forbidden to a company registered only provisionally. Sect. 25 incorporates the company from the date of the certificate; and without a certificate is granted no such corporation as is contemplated by the act can exist, and sect. 55 could not be complied with by showing that the defendant was a holder of shares in a company, that is, in a certified company.

[*Lord Campbell*, C. J. Under never indebted, I cannot see how it is necessary to prove the certificate. The only issue at all pointed to the creation of the company is the second, and that denies only that they were completely registered, which it is proved they were.]

The act provides no means of complete registration, except through the medium of the certificate, and, therefore, evidence of it is essential, and no such evidence of it was given at the trial. Next, as to the erasure. It vitiated and avoided the deed against a party to it, because no evidence was given to account for it. The defendant became a holder of shares under the conditions specified in the deed, and it could not be read against him.

[*Lord Campbell*, C. J. Did the alteration disincorporate the company?

Wightman, J. The only object of producing the deed was to show that the defendant was the holder of one hundred shares when he signed it. The fact of a name being afterwards erased does not prevent that being shown by it.]

The defendant must have continued a shareholder up to the time when the calls in question were made. The deed is the foundation of the obligation, as in *The Earl of Falmouth v. Roberts*, 9 Mee. & W. 469; s. c. 11 Law J. Rep. (n. s.) Exch. 180; and if the deed is inadmissible against the defendant, his liability is at an end.

[*Patteson*, J. None of the pleas are pointed to the erasure.]

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The objection arises under never indebted, as there is nothing in sect. 55 to dispense with the necessity of a valid deed being shown. On the point that a deed is avoided by alteration in a material part, they cited *Pigot's Case*, 11 Rep. 26. *Master v. Miller*, 2. H. Black, 140. *French v. Patton*, 9 East, 351. *Hibblewhite v. M'Morine*, 6 Mee. & W. 200; s. c. 9 Law J. Rep. (N. S.) Exch. 217. *Cowie v. Halsall*, 4 B. & Ald. 197. *Davidson v. Cooper*. *Cur. adv. vult.*

The judgment of the court was now delivered by

LORD CAMPBELL, C. J. We are of opinion that the rule in this case for a nonsuit, or to enter a verdict upon some of the issues for the defendant, should be discharged. The first question discussed was as to proof of the "certificate of complete registration." The plaintiffs' counsel failed in showing that they had proved at the trial a sufficient search for the original, to let in secondary evidence of its contents, or that such secondary evidence, if receivable, had been adduced. But we think that this certificate was not a necessary part of their case upon any of the issues joined. Looking to the 7th and 25th sections of the 7 & 8 Vict. c. 110, there can be no doubt that such a company cannot maintain such an action as this, until it shall have obtained a certificate of complete registration; and a plea that it had not obtained a certificate of complete registration before the commencement of the action would have been a good bar. No such plea has been pleaded. The first plea is *nunquam indebtedatus*, and the defendant's counsel have strongly insisted that under this plea the plaintiffs were bound to give the certificate in evidence, as without it they had no power to order a call, and the defendant never could have been indebted. But the 55th section of the statute enacts, that in an action for calls "the declaration need only state that the defendant, as holder of a certain number of shares in the company, was indebted to the company in a certain sum for certain instalments of capital then due and payable in respect of the said shares; and that if upon the trial of the action it shall be proved that the defendant was the holder of any share when such instalments for which the action is brought became due, then such company shall recover such instalments, together with interest for the same." The objection rests entirely upon the expression "such company," from which it is argued that the plaintiffs must prove that they had obtained a certificate of complete registration before they can seek to take the benefit of the statute. But we are of opinion, that the plea of *nunquam indebtedatus* does not put in issue the regular formation of the company, and that under it the plaintiffs are entitled to a verdict on proving the due making of the calls, that the defendant had due notice of them, and that he was a shareholder when they were made. The advisers of the defendant seem to have been aware of this, and, therefore, they have pleaded, secondly, "that the plaintiffs were not before or at the commencement of this suit a company completely registered." This is a traverse of part of an averment with which the declaration begins, for, after stating their corporate name, they

add, "being a company completely registered, and which before the commencement of this suit had obtained a certificate of complete registration according to the form of the statute," &c. Under this plea the plaintiffs did prove that they were in all respects a company completely registered, unless a certificate of complete registration is necessary to the fact of registration. We are of opinion that it is not. The certificate of an act being done is something different from the act itself, and must be subsequent to the act which is to be certified. A certificate of marriage is no part of the marriage ceremony, and the marriage must have taken place before a certificate of it can be granted. The defendant here might have put in issue the *certificate* of complete registration as well as the *fact* of complete registration, but he has omitted to do so. Evidence of the certificate could not be necessary under the third plea, denying that the plaintiffs were a company formed by any deed in writing; or under the last plea, alleging that the deed by which the company was formed did not contain the several clauses and articles required by the statute in that case made and provided.

We have to consider, then, the legal bearing upon these several issues of the fact that when the deed was produced at the trial, and proof had been given that it was executed by the defendant as a shareholder, there appeared to be the erasure of the name of a person who had signed it as a shareholder before him, the attesting witness saying he believed that the name stood there without erasure when the deed was executed by the defendant. The defendant's counsel at first contended that this erasure entitled him to a verdict on all the issues joined; but afterwards admitted that it was material only under the plea of *nunquam indebitatus*, or, at least, that if they could not avail themselves of it under this plea, they could not under any other. On the authority of *Pigot's Case*, *Master v. Miller*, *Davidson v. Cooper*, and many other cases which they cited, they contended that this was an alteration of the deed in a material part, and that thereby the deed was nullified for all purposes. We must consider for what purpose the deed was offered in evidence under the plea of *nunquam indebitatus*. It was only to prove that the defendant was a shareholder. It may be doubted whether the line drawn through the name of a shareholder standing before the defendant's could affect the defendant's liability, or be considered an alteration of the deed as to him within the rule upon this subject, whether the line had been drawn through the name properly or improperly; but, at all events, we think that the erasure does not prevent the deed from being given in evidence to prove that the defendant executed it as a shareholder. There is no ground for saying, that if a deed be altered in a material part it is rendered void from the beginning. It ceases to have any new operation, and no action can be brought in respect of any pending obligation, which would have arisen from it had it remained entire; but it may still be given in evidence to prove a right or title created by its having been executed, or to prove any collateral fact. This is not an action on the deed, but upon the act of Parliament, which renders the defendant liable to be sued in this form if he was

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a shareholder when the calls were made. This execution of the deed shows that he was then a shareholder, and the erasing of the name of another shareholder rightfully or wrongfully could not divest from the defendant the shares which he before held. The deed, therefore, was evidence that he was a shareholder when the calls were made. For these reasons, we think that it was unnecessary for the plaintiffs to explain the erasure by showing that it arose from accident, or was the act of a spoliator, or was justifiably done, the shareholder having ceased to be a member of the company; and that upon the evidence adduced at the trial they are entitled to retain their verdict upon all the issues.

Rule discharged.

DOE d. ARMISTEAD v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.¹

Hilary Vacation, February 22, 1851.

Railway — Lands Clauses Consolidation Act — 8 Vict. c. 18, s. 85 — Compulsory Powers — Compensation for Land taken — Ejectment — Limits of Deviation — 8 Vict. c. 20 — Entry.

The ascertaining the amount of compensation after lands have been entered upon and taken under sect. 85 of the Lands Clauses Consolidation Act, is no exercise of a compulsory power on the part of the company.

Sect. 68 applies to the case of lands entered upon and used under sect. 85, and the land owner is in such case bound to initiate proceedings for settling the compensation.

Where a railway company have complied with the provisions of sect. 85, and have entered upon and taken land within the prescribed period for exercising their compulsory powers, their continuance in possession after the prescribed period, without having the compensation assessed and the land conveyed to them, is not unlawful, and an ejectment cannot be maintained against them under such circumstances.

A was the owner of a field, the whole of which was contained in the books of reference of a railway company, but fifteen perches of it lay beyond the limits of deviation laid down in the plans. The company served a notice upon A, requiring part of the field for the purpose of the railway. A then gave notice to the company that if they took part they must take the whole, to which they agreed. A afterwards receded from his notice. The company then entered upon the whole under sect. 85 of the Lands Clauses Consolidation Act:—

Held, that the question, whether the fifteen perches were necessary for the works, was for the jury, and also that A, having required the company to take the whole, could not object that their entry on that portion was unlawful.

The expression "deviation," in 8 Vict. c. 20, s. 15, is used with reference to the *medium filum* of the railway as laid down in the parliamentary plans.

EJECTMENT to recover a piece of land called the Cat's Palate, in the county of Stafford. The demise laid in the declaration was dated the 28th of June, 1849.

At the trial, before Patteson, J., at the Staffordshire Spring assizes, 1850, the following facts were taken as agreed upon between the parties: The lessor of the plaintiff was the owner of the Cat's Palate,

¹ 20 Law J. Rep. (N. S.) Q. B. 249.

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the whole of which was delineated and contained in the plans and books of reference deposited by the promoters of the railway, but of which fifteen perches were situate beyond the limits of deviation of the railway as shown on the deposited plans. The lessor of the plaintiff had in 1847 sold and conveyed to the defendants, for 395*l.*, the upper portion of the Cat's Palate, consisting of twenty-six perches, all of which lay within the limits of deviation. The company afterwards served a notice on the lessor of the plaintiff, dated the 1st of July, 1848, requiring a further portion of the Cat's Palate, whereupon the lessor of the plaintiff gave them notice that if they took such further portion, he should require them to take the whole of the Cat's Palate, which the defendants agreed to do. The lessor of the plaintiff, however, refusing to carry out this agreement, the defendants, on the 13th of September, 1848, deposited in the bank the sum of 638*l.*, being the amount at which the residue of the Cat's Palate was valued by a surveyor appointed by two justices under sect. 85 of the Lands Clauses Consolidation Act, and also entered into a bond according to the provisions of that section, and entered upon and used the land for the purposes of making their railway. No steps to get the compensation assessed or to have the land conveyed to the defendants were taken by either party, and on the 26th of June, 1849, the defendant's compulsory powers for the purchase or taking of land for the purpose of their undertaking ceased. Upon these facts, it was contended that the lessor of the plaintiff was entitled to recover all the land entered upon under sect. 85, as the title of the company to it was defeated by their not having completed the purchase within the prescribed period, and also that the fifteen perches beyond the limits of deviation could not be taken by the defendants, and being included in the bond, vitiated the entry altogether. The learned judge being of opinion that no property had passed to the defendants under sect. 85, directed a verdict for the lessor of the plaintiff, with liberty to the defendant to enter a nonsuit, or to confine the verdict by excluding the fifteen perches. A rule *nisi* having been accordingly obtained, —

Whateley and *Whitmore* showed cause.¹ The first question arises as to the effect of the entry of the defendants under sect. 85 of the 8 Vict. c. 18, when the time limited for the compulsory purchase and taking of land has expired without any conveyance vesting the property in the defendants having been executed. It will not be contended by the defendants that they have acquired any title to this land, but it will be argued that their right of possession conferred by that section is not determined by the effluxion of the prescribed period. But the right of possession was merely incident to their right of purchasing, which has expired, and it cannot, therefore, now be relied upon as an answer to an ejectment. Generally the promoters of a company have no right to enter upon any lands, except by consent, before payment of the price of such lands. Sect. 85 ingrafts

¹ November 27, before PATTESON, COLERIDGE, WIGHTMAN, and ERLE, JJ.

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an exception on that disability, and gives the power of entering upon and using the lands for a temporary purpose upon complying with the conditions required by that section; but the promoters are bound to go on and get the compensation awarded and take a conveyance, or at all events execute a deed poll under sect. 75, within the prescribed period for exercising their compulsory powers. The whole scope of sect. 85 shows that it gives merely a temporary right of user, which must be perfected by completion of the purchase.

[*Wightman, J.* What is there to prevent the company going on now to get the value assessed?]

To hold that they could do so, would abrogate sect. 123, and in effect extend the time for exercising their compulsory powers of purchase.

[*Erle, J.*, referred to *The Queen v. The Birmingham and Oxford Junction Railway Company*, 19 Law J. Rep. (N. S.) Q. B. 453.]

In that case it was held, that where a land owner was desirous of having the compensation assessed and the purchase completed, the company could not, as against him, set up the expiration of the time. But here the lessor of the plaintiff is an unwilling vendor. The company are seeking to exercise the compulsory powers for their own benefit. That case also is now before a court of error,¹ and is opposed to *Brocklebank v. The Whitehaven Junction Railway Company*, 16 Law J. Rep. (N. S.) Chanc. 471, which has never been overruled, although the lord chancellor intimated some doubt about it.

[*Coleridge, J.* Sect. 123 refers to the taking and purchase of land, both of which things are provided for under previous clauses. The company have taken these lands, and why may they not go on to complete the taking which they have commenced?]

They can only complete the title by purchasing.

[*Erle, J.* I find nothing in sect. 85 to show that the power of taking is so limited.]

The condition of the bond shows that the taking is only a means to an end, viz., going on to purchase.

[*Coleridge, J.* If the land owner still has the legal estate he might bring ejectment, even within the three years.]

The statutory license would prevent his doing that. Secondly, as to the fifteen perches which are beyond the limits of deviation and which are included in the bond. The bond being for an entire sum, it would be necessary to have the decision of a jury upon the whole of this land before the claimant could touch any of the money. *Crawford v. The Chester and Holyhead Railway Company*, 11 Jur. 917. The railway must be made within the limits of deviation delineated in the deposited plans; 8 Vict. c. 20, s. 15; and no land situate beyond those limits, although included in the books of reference, can be taken except by consent.

[*Erle, J.* The datum line, which is a mathematical line along the centre of the railway, may be moved to the limits of deviation.]

That was, no doubt, so decided in *Doe d. Payne v. The Bristol and*

¹ It was afterwards affirmed — see *post*, p. 276.

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Exeter Railway Company, 6 Mee. & W. 320; s. c. 9 Law J. Rep. (n. s.) Exch. 232, and that would give a slight additional breadth for cuttings or embankments. It is not contended that this land is required for the railway or for a station; and it is clear that the powers of taking land are limited to such portions as are required for the railway or works.

[*Wightman*, J. Notice to take the whole was given by you to the company.]

Still, that will not increase their powers. It is plain, from sect. 27 of the 8 Vict. c. 18, that the company have no right to retain land not wanted by them for their works.

Keating and *Phipson*, in support of the rule. The Lands Clauses Consolidation Act provides for two distinct modes of acquiring land for the purposes of the undertaking otherwise than by agreement. At sect. 16, there commences a set of clauses applying where the company is out of possession of the lands, and is seeking to take them by means of purchase. The words used in sect. 18, "purchase or take," are the same as those found in sect. 123, which therefore applies only to that kind of proceedings where the company must purchase before entry. There is, however, a distinct mode of proceeding given by sect. 85, by which the company can, upon complying with the requisites of that section, enter upon and take the land without purchase, and whenever such an entry is made they have exercised their compulsory powers. All that has to be done afterwards is to pay the money and take the conveyance. The amount of the valuation is to be paid into the bank, as a security, and to be paid out to the land owner in case the company fail to perform the condition of the bond. The company cannot ever get back the deposit. There is nothing to prevent the land owner from having now a jury called out, under sect. 68, to assess this compensation. *The Queen v. The Birmingham and Oxford Junction Railway Company*, and *Adams v. the London and Blackwall Railway Company*, 2 M.N. & Gor. 118; s. c. 19 Law J. Rep. (n. s.) Chanc. 557. The company has a parliamentary title to the possession. If sect. 85 gave no more right than is contended for on the other side, it would be competent for the land owner at any moment to eject the company. Then, secondly, as to the fifteen perches. It must be assumed that all the land which is contained in the books of reference is necessary for making the works. At all events, it lies on the lessor of the plaintiff to show that it is not so. It is said also that these fifteen perches cannot be taken, because they lie beyond the limits of deviation, and that the bond being given for the whole is void altogether. But there is no ground for saying that there is any absolute prohibition against taking any land beyond the limits, which, according to *Doe d. Payne v. The Bristol and Exeter Railway Company*, restrain only the *medium filum* of the railway. But if any lands specified in the plans and books of reference are required for the purpose of the railway or works, they may be taken, although they are beyond the limits of deviation. *Crawford v. The Chester and Holyhead Railway Company*. *Cothor v. The Midland Railway Company*, 17 Law J. Rep. (n. s.) Chanc. 235. *The North British Railway Com-*

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pany v. Todd, 12 Cl. & F. 722. *Beardmer v. The London and North-western Railway Company*, 1 M'N. & Gor. 112; s. c. 18 Law J. Rep. (n. s.) Chanc. 432.

[*Coleridge, J.* Was it shown here that, if the *medium filum* had been moved to the limit of deviation, the whole of the fifteen perches would be covered by the railway?]

That was not required to be put to the jury, and it was unnecessary, because the fifteen perches were contained in the plans and books of reference. There is nothing in *Doe d. Payne v. The Bristol and Exeter Railway Company* to show that such a limit is to be imposed on the company, and sect. 127 seems to contemplate that a company may purchase more than is actually required for their works, otherwise it would be useless to provide for their selling it after ten years.

[*Wightman, J.* That section may apply to cases where a land owner compels the company to take more than they actually want.]

It applies generally to all land purchased *bona fide* by the promoters, but which turns out not to be required.

Cur. adv. vult.

Judgment was now delivered by

PATTESON, J. The first question in this case turns upon the 85th and 123d sections of the 8 & 9 Vict. c. 18. Under the 85th section, the defendants had entered upon the lands in question, complying with all the requisites, by paying the proper sum of money into the Bank of England and giving bond; but they had taken no further steps to ascertain the amount to be paid by them to the lessor of the plaintiff for the land, or to clothe themselves with the legal title. Neither did the lessor of the plaintiff take any step for that purpose. Both parties remaining inactive, the three years limited by the 123d section of the same act expired, upon which this action of ejectment is brought, the lessor of the plaintiff contending that as soon as the three years had expired the possession of the defendants became wrongful, and all their previous proceedings inoperative, as much as if none such had been taken.

The 123d section enacts, that the powers of the promoters of the undertaking for the compulsory purchase or taking of lands for the purposes of the special act shall not be exercised after the expiration of three years from the passing of the special act. The 85th section empowers the company to enter upon and use the lands, but has not the word "take." We do not think that the difference of the words adopted in these sections has any material bearing upon this case. It is conceded that the entry was lawful when made, and that the possession continued to be lawful until the expiration of the three years, at least with respect to all the land except fifteen perches. This being so, the duty of taking steps for ascertaining the amount of compensation to be paid by the company is, by the 68th section of the same act, thrown upon the owner of the land. He is to state what sum he claims, and if the company, within twenty-one days, enter into a written agreement to pay that sum, the question of compensation is settled; but if the company dispute the proper amount, then

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it is to be settled by arbitration, or, if the owner gives notice of his wish to have a jury, then by such jury, which the company are required to summon within twenty-one days, and in default thereof are liable to pay the sum claimed. No power is given to the company by that or any other section to initiate proceedings for settling the amount. We are clearly of opinion that sect. 68 applies to the case of lands entered upon and used under sect. 85; and of this opinion also were Vice Chancellor Wigram and Lord Chancellor Cottenham, as appears by the judgment of the latter in the case of *Adams v. The London and Blackwall Railway Company*. It is not pretended, except as to a small part, fifteen perches, that the company were not entitled to take the land in question. Therefore, even if the effect of the expiration of the three years were to make it impossible under the clauses of the act to take proceedings for ascertaining the amount of compensation, such effect has arisen from the neglect of the owner of the land; and he cannot by his own neglect make wrongful that possession of the land by the company which was rightful when they made their entry.

But we are clearly of opinion that the expiration of the three years had no such effect in this case. The compulsory clause, sect. 85, was acted upon within the three years, and the land rightfully entered upon and taken. The company had exercised their compulsory power under it completely, so far as they were concerned; and, so far as they had need of any such power, the thing was done and finished on their part, for it is to be observed that the words of the 123d section are in the disjunctive, "for the compulsory purchase or taking." The ascertaining the amount of compensation after the lands were entered upon and used, and indeed taken, is no exercise of a compulsory power on the part of the company. With all possible respect for the opinion of the late vice chancellor of England, we cannot agree to the view which he took in the case of *Brocklebank v. The Whitehaven Railway Company*, in which view it is plain that the lord chancellor did not acquiesce. And this court has granted a *mandamus* to compel a company, after the expiration of the three years, to take steps to have the amount of compensation ascertained, at the requisition of an owner to whom they had given notice of taking his land within the three years, — *Osborn's Case*, *The Queen v. The Birmingham and Oxford Junction Railway Company*, 19 Law J. Rep. (N. S.) Q. B. 453, — which decision has been supported by the Court of Exchequer chamber a few days since. The case of *Brocklebank v. The Whitehaven Railway Company* is, however, distinguishable from the present, because there no compulsory possession had been taken, the land remained still in the possession of the original owner, and that circumstance is remarked by the vice chancellor in his judgment. We are, therefore, clearly of opinion, that if the original entry was lawful, the present possession is lawful, and that this ejectment cannot be sustained.

But it is contended, secondly, that as to fifteen perches the entry was not lawful, and being bad in part is bad altogether: first, because they are beyond the line of deviation; and, secondly, because they

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were not necessary for the purposes of the special act. With respect to the first ground of objection, we are of opinion that the expression "deviation" in the acts of Parliament, and particularly the 8 & 9 Vict. c. 20, s. 15, is to be taken with reference to the line of railway only; that is, that the line of railway actually laid down shall not deviate more than one hundred yards from the line laid down and delineated in the parliamentary plans, the *medium filum viae* of each being the commencement and termination in measuring those one hundred yards.

This appears to be the natural construction of the acts, and is in accordance with the decision of the Court of Exchequer in *Doe d. Payne v. The Bristol and Exeter Railway Company*, and of the vice chancellor of England in *Crawford v. The Chester and Holyhead Railway Company*. In this case there has been no deviation in that sense, and the first ground of objection is not in truth raised by the facts. As to the second ground, it appears that the whole of the land taken called Cat's Palate, including the fifteen perches in question, is contained in the books of reference. But it is said, that circumstance alone is not sufficient, and that, in order to justify the company in taking these lands, they must be necessary for their works. Now, the upper part of Cat's Palate, which was taken and paid for, was clearly necessary; the company then required a further part of Cat's Palate, which was also necessary, and the lessor of the plaintiff gave notice that if they took the further part they must take the whole, which they were willing to do, but he afterwards receded from that notice. Whether these fifteen perches were necessary or not was a question of fact for the jury, and, if he had been asked, the judge must have put it to the jury; but it was assumed at the trial that the company were entitled to take, at all events, what was within the line of deviation, and the circumstance of the fifteen perches being without that line was mainly relied on.

The question as to being necessary would apply not only to the fifteen perches, but to all that was taken under the 85th section; that is, to all but the upper part, which was taken and paid for by agreement. So far as the court can see, as the matter now stands, the fifteen perches were as necessary as the rest, or, at all events, the company were justified in taking them, because the lessor of the plaintiff had required them by notice to do so. We think, therefore, that the rule must be made absolute, to enter a verdict for the defendants.

*Rule absolute accordingly.*¹

¹ See the next case.

Worsley & another v. The South Devon Railway Company.

WORSLEY & another v. THE SOUTH DEVON RAILWAY COMPANY.¹

Hilary Vacation, February 22, 1851.

*Railway — Lands Clauses Consolidation Act — 8 Vict. c. 18, s. 85 —
Warrant to summon Jury — Interested Under Sheriff — Compulsory
Powers — Taking Land — Pleading — De Injuria — Interest in
Land — Authority of Law.*

Under sect. 39 of the Lands Clauses Consolidation Act, the promoters of a railway company may properly issue their warrant to summon a compensation jury to the sheriff of the county where the lands are situated, although the under sheriff be interested as a shareholder in the company.

In such a case, the sheriff should either take the inquisition in person or appoint some disinterested deputy.

Where the promoters of a railway company have entered upon and taken land under the provisions of sect. 85 of the Lands Clauses Consolidation Act within the period prescribed for exercising their compulsory powers, their continuance in possession after that period, without making compensation to the owner of the land, does not render their original entry unlawful.

In an action for injury to land, the defendants (a railway company) pleaded that they entered on the plaintiff's land under sect. 85 of the Lands Clauses Consolidation Act, before the expiration of the prescribed period for exercising their compulsory powers, and having so entered and being lawfully in possession of the land, that they, after the expiration of the prescribed period, continued in possession, and in the due and lawful exercise of the powers of the said act committed the grievances complained of. The plaintiff replied (admitting the statute) *de injuria absque residuo causae* : —

Held, that the replication was bad, as the plea claimed an interest in land, and the replication traversed an authority in law by the denial of acting under the statute.

ACTION on the case. The first count of the declaration stated that the plaintiffs were the owners in fee of certain houses, lands and premises, thereafter mentioned, situate in the county of Devon, and that the defendants, according to the Lands Clauses Consolidation Act, 1845, gave notice to the plaintiffs, then being the parties, according to the said act, enabled to sell and convey the lands thereafter mentioned, that they (the defendants) required to purchase certain houses, &c., which, by the said act, they were authorized to purchase and take, that is to say, &c. And by their said notice the said company then demanded from the plaintiffs the particulars of their estate, &c., in the said lands, &c., and of the claims made by them in respect thereof. That the said notice also stated the particulars of the said lands, &c., and that the said company were willing to treat for their purchase, &c. That within twenty-one days after the service of the said notice, to wit, on, &c., the plaintiffs stated to the defendants the particulars in writing of their claim, &c., and claimed as compensation for their interest and for damages 2500*l*. That no agreement having been come to between the said company and the plaintiffs, &c., it became and was necessary that the question of the amount of compensation should be settled by the verdict of a jury according to the said act. That at the time of committing, &c., and of holding and taking the inquisition thereafter mentioned, J. Sillifant, Esq., was

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sheriff of the county of Devon, and M. Kennaway was then the under sheriff for the said county, and that the said M. Kennaway was, at the times of giving the notice hereinafter mentioned, and of committing, &c., and of holding the inquisition, &c., a shareholder of and in the said company, and, as such shareholder, interested in the matters in dispute as aforesaid. That the defendants during all the said times well knew that the said M. Kennaway was such under sheriff and such shareholder, and so interested, but that the said fact of the said M. Kennaway being such shareholder, &c., was, during all the time aforesaid, wholly unknown to the plaintiffs. That afterwards, to wit, on, &c., the said M. Kennaway, being then such under sheriff and shareholder, as the defendants then well knew, the defendants gave the plaintiffs a notice in writing, stating that it was the defendants' intention, at the expiration of ten days from the service of such notice, to cause a jury to be summoned for the purpose of assessing the sums to be paid as compensation to the plaintiffs, and that the defendants were willing to give 1700*l.* for the estate, &c., of the plaintiffs, including therein all damage to be sustained by them. That afterwards, to wit, on, &c., the said M. Kennaway, being then such under sheriff and shareholder, &c., as the defendants well knew, and there being then and thenceforth up to the holding of the inquisition divers coroners of the said county of Devon, to wit, &c., not interested in the said matters in dispute, (as the defendants well knew,) the defendants wrongfully, &c., and against the form and intent of the said statute, made out and issued their warrant under their common seal, and directed the same to the sheriff of the said county of Devon, to wit, on, &c., and thereby required the said sheriff to nominate a jury to appear before him, the said sheriff, or his under sheriff, on, &c., to inquire of the sum of money to be paid by the defendants for the purchase of the said houses, &c., being the property of the plaintiffs, and also the sum of money to be paid by way of compensation for the damage, &c. That the defendants, to wit, on, &c., delivered the said warrant to the said sheriff, by means of the committing of which said grievance by the defendants, the plaintiffs, not knowing that the said M. Kennaway was such shareholder, &c., were afterwards put to and incurred divers great costs, in attending at the office of the said sheriff, in obedience and according to the exigence of a summons issued to them by the said sheriff, and also in and about attending upon the holding and taking of an inquisition, verdict, and judgment, holden before the said J. Sillifant, Esq., then being such sheriff, the said M. Kennaway being then such under sheriff and shareholder, &c., as the defendants well knew, and being then present at the holding of the said inquisition, &c., when the jury gave their verdict for 1650*l.*, &c., and also, &c., (alleging as special damage that the plaintiffs were obliged to get the said inquisition quashed upon *certiorari*.)

The second count was for pulling down and removing a certain messuage, &c., to which the plaintiffs were entitled in reversion, and subverting the soil thereof, and placing divers embankments thereon.

The third count was for a similar injury to the plaintiffs, as reversioners in respect of another messuage, &c.

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General demurrer to the first count, and joinder therein.

Plea to the second count,—that before and at the said times when, &c., by virtue of certain acts, (the special act and the Lands Clauses Consolidation Act, 1845,) the defendants were authorized and empowered to enter into and take, for the purposes of the said railway, divers messuages, and amongst others the said messuage, &c., in which, &c.; which said messuage, &c., were and are delineated on plans and described in the books of reference, and were necessary and required by the defendants for the purpose of making and constructing the said railway; that the defendants afterwards, and within three years from the passing of their special act, and before the said times when, &c., to wit, on, &c., gave notice to the plaintiffs that they required to purchase and take the said messuage, &c., for the purpose of making the said railway, and stated in their said notice that they were willing to treat for the purchase of the said messuage, &c., and to pay compensation for any damage, and thereby demanded the particulars of the plaintiffs' estate, &c. That the plaintiffs gave the defendants a notice claiming 2040*l*. That afterwards, and before the said time when, &c., to wit, on, &c., the whole of the capital having been duly subscribed under the contract, as by the said Lands Clauses Consolidation Act is required, the defendants were desirous of entering upon and using the said messuage, &c., before any agreement had been come to, or award made, or verdict given for the purchase money or compensation, in respect of the said messuage, &c., of all which premises the plaintiffs had notice, and dissented from the defendants so entering, &c. That the defendants deposited in the Bank of England, by way of security, 2040*l*., being the amount claimed by the plaintiffs, to the credit of the plaintiffs, and also delivered to the plaintiffs a bond under the common seal of the defendants, and under the hands and seals of two sufficient sureties, to wit, &c., whereby the defendants and the said sureties became bound to the plaintiffs in the penal sum of 2040*l*. conditioned for payment to the plaintiffs, their executors, &c., or for deposit in the Bank of England, for the benefit of the parties entitled to the said messuage, &c., as the case might require, under the provisions for that purpose contained in the said Lands Clauses Consolidation Act, 1845, of all such purchase money and compensation as might be determined to be payable by the defendants in respect of the said messuage, &c., together with interest thereon, at 5*l*. per cent. from the time when the defendants should so enter on the said messuage, &c., until the purchase money or compensation should be so paid to the plaintiffs, &c., or deposited in the Bank of England, &c. That afterwards, and within three years from the passing of the said special act, to wit, on the days and times in the second count mentioned, the defendants entered upon the said messuage in which, &c., for the purpose of making, and did make thereon certain works, then being part of the said railway, &c., authorized by the said special act, as it was lawful for the defendants to do, and thereby necessarily and unavoidably committed the said grievances, &c.

There was a similar plea to the third count.

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The plaintiffs replied to these pleas (admitting the acts of Parliament) *de injuria absque residuo causæ*, and also newly assigned that the defendants, at other and different times, &c., after the expiration of three years from the passing of the special act, to wit, on, &c., for other and different purposes than those in the said pleas mentioned, wrongfully, &c., cut, dug, and made divers ditches and trenches in and upon the said lands, &c., by means of the committing of which last-mentioned grievances, the plaintiffs were injured in their said reversionary estate, &c., and which grievances above newly assigned were other and different grievances than those in the said pleas mentioned, &c.

The defendants pleaded to the new assignments pleas exactly similar to those pleaded to the second and third counts, except that after alleging the entry on the lands to have been within the three years from the passing of the special act, they concluded, "and having so lawfully entered into and upon, and being so lawfully in possession of the said messuage, &c., for the purpose aforesaid, the defendants afterwards and after the expiration of three years from the passing of the said special act, to wit, on the several days and times in the said new assignment mentioned, for the purposes of the said railway, &c., (the said messuage, &c., in which, &c., then, to wit, on, &c., being necessary and required by the defendants for those purposes, in the due and lawful exercise of the powers and authorities by the said act given to and conferred upon them,) committed the said several grievances newly assigned, &c.

To these pleas to the new assignment the plaintiffs replied (admitting the statutes) *de injuria absque residuo causæ*, to which the defendants demurred specially, on the ground that *de injuria* was not admissible, as it traversed an authority in law, and also as the defendants claimed by their plea an interest in the land of the plaintiffs. Joinder in demurrer.

Peacock, for the defendants.¹ The question raised by the demurrer to the first count is, whether the company are liable to an action for directing their warrant to the sheriff when the under sheriff is an interested party. The proceedings to be taken for summoning a jury are specified in sect. 39 of the 8 Vict. c. 18, (the Lands Clauses Consolidation Act, 1845;) and the only case in which the company are authorized to issue their warrant to the coroner is, where the sheriff himself is interested in the matter in dispute. Here it could have been directed to no other person except the sheriff.

[*Coleridge, J.* The plaintiff reads the clause as if sheriff included "under sheriff."]

That is not the proper construction. The sheriff may himself act in taking the inquisition, and need not depute it to his under sheriff, and the company cannot be liable for the improper proceeding of the sheriff. Indeed, it appears by the declaration that the sheriff himself

¹ January 17, before LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and WIGHTMAN, JJ.

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took the inquisition in this case. The mere presence at the time of the interested under sheriff, as alleged, cannot affect the company. Where there are two sheriffs of a city, as in Bristol, and one of them only is interested, it has been held that process should be directed to the other. *Letsom v. Bickley*, 5 M. & S. 144. See, also, *Corrigall v. The London and Blackwall Railway Company*, 5 Man. & G. 219; s. c. 6 Sc. N. R. 241; 12 Law J. Rep. (N. S.) C. P. 209. *The King and Queen v. Warrington*, 1 Salk. 152. As to the allegation that the inquisition was set aside by this court, that was because the partner of the under sheriff was present at the striking of the special jury. No such ground can render the company liable to an action.

[Lord Campbell, C. J. The master of the crown office has referred us to an authority in accordance with those cited by you.¹ You may, therefore, go to the other point.]

That turns upon the effect of sect. 85 of the Lands Clauses Consolidation Act. If the pleas which are framed under that section set up a right to the land, and not merely a license to use it, the replications are bad. The new assignments allege that the entry complained of took place after the expiration of three years, the time limited for exercising the compulsory powers of the act. The pleas to the new assignments assert that the original entry under sect. 85 took place within the three years, but admit that the defendants having so entered made use of the land for the purpose of constructing the railway after the expiration of the three years. The compulsory powers for the purchase or taking of land were exercised in this case by the entry under sect. 85, and giving the bond thereby required, and the company do not become trespassers because the period expires before the proceedings for settling the compensation are completed. Their original entry was lawful, and possession might have been given by the sheriff under sect. 91. They had, therefore, a right to the land, and not merely a license determinable at the end of three years. The proceedings to assess compensation under sect. 68 relate to a case where lands have been previously entered upon under sect. 85, and must be initiated by the land owner and not by the company. *Adams v. The London and Blackwall Railway Company*, 2 M. & G. 118; s. c. 19 Law J. Rep. (N. S.) Chanc. 557. See, also, *Railstone v. The York, Newcastle, and Berwick Railway Company*, 19 Law J. Rep. (N. S.) Q. B. 464. It has already been held, that where a land owner has given notice that he requires a jury to be summoned within the period, he may afterwards compel the company to issue their warrant. *The Queen v. The Birmingham and Oxford Junction Railway Company*, 19 Law J. Rep. (N. S.) Q. B. 453.

¹ The reporters have been kindly favored with the particulars of this case, which was decided by Holroyd, J., at chambers. Upon an indictment for libel in a Yorkshire newspaper, one of the defendants being under sheriff of the county, application was made upon that ground for leave to enter a suggestion, and for the jury process to be directed to the coroner, instead of to the sheriff; but Holroyd, J., said, that the right way was to direct the process to the sheriff, who is himself not interested, with a special provision that the under sheriff do not in any way intermeddle.

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Butt, contra. First, as to the first count. The cases cited do not apply, because, reading the 3d and 39th sections together, the word "sheriff" in the latter must be understood to include an "under sheriff, or other legally competent deputy." If so, the writ was wrongly directed to the sheriff, and the company are liable to an action for the injury sustained by the plaintiffs thereby. With regard to the second point, the same question has been raised in *Doe d. Armistead v. The North Staffordshire Railway Company*, 20 Law J. Rep. (N. S.) Q. B. 249, ante, p. 216. Sect. 85 gives the promoters merely a permission or license to enter upon and use the lands required by them, upon their depositing the sum there specified and giving a bond conditioned as there stated; but that license is conditional upon their taking all such steps as will complete their title to the land within the prescribed period. If they fail to do so, the license terminates, and the possession of the promoters becomes unlawful. These pleas, therefore, do not set up any interest in land, and, as the statutes are admitted, the residue may well be traversed by a general replication *de injuria*. The pleas, too, are bad, because, at all events, the defendants should have shown that they were prevented from exercising their compulsory powers within the prescribed period, by some act of the plaintiff. *Adams v. The London and Blackwall Railway Company* is inapplicable to the present question, which is not as to the mode of assessing compensation, but as to the effect of its non-assessment within the prescribed period. Then, it is said that a contract is raised by the notice requiring the land and the claim of the land owner; but such a contract is only binding on the land owner on the condition of the company taking all steps to complete the purchase within the prescribed period. In *The Queen v. The Birmingham and Oxford Junction Railway Company*, the court took a distinction between a step by the land owner and one by the company, and held that the compulsory powers referred to in sect. 123 were those which enabled the company to take, not those which the land owner might exercise to get the purchase completed. Here, a statutory power is given to the company to get the compensation assessed, and that power is not exercised by one or two preliminary steps being taken. Their perfecting their title is a compulsory proceeding on their part, which they are bound to take within three years.

Peacock, in reply, was directed by the court to confine himself to the last point. It is said that sect. 85 operates to give a mere license to enter upon and use the lands; but even if that be so, it vests an interest, to some extent at least, in the company, and is not therefore countermandable. *Wood v. Leadbitter*, 13 Mee. & W. 838; s. c. 14 Law J. Rep. (N. S.) Exch. 161; and the replications are, therefore, bad. Then, as to the license expiring at the end of the three years if the compensation is not then settled, that cannot be so, because those proceedings are merely for the purpose of perfecting the inchoate title which is derived under sect. 85.

LORD CAMPBELL, C. J. The first count discloses no ground of

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action. The grievance alleged is, that the company issued their warrant to the sheriff of the county of Devon, the under sheriff being interested as a shareholder in the company. Looking at sect. 39 alone, this would be no grievance to the plaintiff, because the warrant is required to be directed to the sheriff; and although the under sheriff be interested, the inquisition is required to be taken by the sheriff, who may act either in person or authorize some other disinterested deputy. But the plaintiff relies on the interpretation clause, sect. 3, which provides that the word "sheriff" shall include under sheriff or other legally competent deputy. But that clause is introduced by the words "unless there be something either in the subject or context repugnant to such construction." It seems to me that it would be repugnant to the subject and context of sect. 39 to adopt the interpretation contended for by the plaintiff, because it would require us to read it that the warrant may be issued to the sheriff or under sheriff, or other legally competent deputy, which is not the case, for the warrant must go to the sheriff unless he is himself interested. If there are two persons who fill the office of sheriff of a county, and one alone is interested, process properly goes to the other, and not to the coroner. There are several cases to that effect, especially one to which the master of the crown office has referred us. Therefore, there was no wrong done by issuing the warrant to the sheriff in this case. I may add, that the interpretation clause referred to uses the words "other legally competent deputy," which this under sheriff was not, and, therefore, we must suppose only a disinterested under sheriff could be contemplated.

PATTESON, J. When we quashed this inquisition, we did not do so because the writ directed to the sheriff was void. That objection is now raised, and the interpretation clause is relied on in support of it, but I cannot think that the interpretation clause can be applied to a case of this kind, where the sheriff might execute the warrant in person, or where he might appoint some legally competent deputy for the purpose. The case referred to by the master of the crown office is very strong. The defendants were, therefore, right in issuing the warrant to the sheriff, and for any thing that was done afterwards they cannot be responsible.

COLERIDGE, J. I will merely add on this clause, that it is divisible into two parts: there is a direction to issue the warrant, and a provision in case of the person to whom the warrant would be directed being interested. Now, you cannot apply the interpretation clause to the second part of sect. 39 without applying it also to the first part; and you cannot do that, because it is impossible to say that the warrant could be directed to the sheriff or under sheriff, or to the sheriff and under sheriff. That would be giving no effect to the words "such sheriff."

WIGHTMAN, J. It appears to me that there is great weight in the remark just made by my brother Coleridge, that the interpretation

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clause must be applied equally to all parts of sect. 39. Therefore, as to the first count, there will be judgment for the defendants.

As to the other point, —

Our. adv. vult.

Judgment upon the point reserved was now delivered by

PATTESON, J. The demurrer to the first count of the declaration in this case was disposed of upon the argument in favor of the defendants. The second and third counts stated injuries to the reversionary estate of the plaintiffs in certain premises taken by the defendants for the purposes of their railway. The defendants pleaded to each count a justification under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, s. 85. The plaintiffs replied *de injuria*, on which issues were taken, and also new assigned as to each plea, that the defendants continued the injuries after the expiration of three years from the passing of the defendant's special act. The defendants pleaded to these new assignments, that they entered under the compulsory clause, sect. 85, before the expiration of three years, and held over afterwards. To these pleas the plaintiffs replied (admitting the act of Parliament) *absque residuo causæ*. The defendants demurred to these replications, on the ground that *de injuria* cannot be replied when the plea claims an interest in the land or justifies under authority of law. On the argument, the plaintiffs objected to the pleas to the new assignments, contending that though the entry under sect. 85, within the three years, was lawful, yet the continuance after the three years was unlawful, unless compensation was actually made within the three years. The same point arose in the case of *Doe d. Armistead v. the North Staffordshire Railway Company*, in which we have just held that such continuance of possession is not unlawful. For the reasons there given, which it is not necessary to repeat, (but with which my Lord Campbell, who heard this case, but not that, fully concurs,) we are of opinion that these pleas are good. The plaintiffs further contend that the replications of *de injuria* are good, inasmuch as they admit the acts of Parliament, but deny acting under it, and also because the pleas disclose no claim to an interest in the land, but only set up a statutable license. We are, however, of opinion that the replications are bad, that this case is clearly within the rules in *Croft's Case*. The right and interest claimed by the pleas is much more than a license; and an authority in law is plainly asserted by them. The admission of the act of Parliament in the replications does not assist the plaintiffs, for the denial of acting under it is a traverse of the authority in law which the admitted act confers, and the interest claimed by the pleas is also traversed by the replications, both those traverses being manifestly included in *absque residuo causæ*.

Judgment for the defendants.

Rumbelow v. Whalley.

RUMBELOW v. WHALLEY.¹

Hilary Term, February 22, 1851.

Pleading — Costs — Action of Debt — Separate Pleas — Payment into Court — Nunquam Indebitatus — Payment — Acceptance of Sum paid into Court — Taxation of Plaintiff's Costs.

Debt for work and labor. Pleas, first, except as to 10*l.* parcel, &c., never indebted; secondly, as to 10*l.* other parcel, &c., payment; thirdly, as to the 10*l.* above excepted, payment into court of 10*l.* 1*s.* in full satisfaction of the said sum of 10*l.* and damages by reason of its non-payment. Replications, joining issue on the first plea; traversing the payment alleged in the second plea; and to the third plea, that the plaintiff accepted and took out of court the amount paid in, in satisfaction of the causes of action in that plea alleged, and prayed judgment for his costs in that respect. A verdict was found for the plaintiff on the plea of never indebted, for 10*l.* beyond the sum paid into court, and for the defendant on the second plea:—

Held, that the plaintiff was entitled, under Reg. Gen. Trin. term, 1 Vict., to have allowed him, on taxation, all his costs of suit in respect of the cause of action to which the plea of payment into court had been pleaded, including the costs of the replication to that plea.

DEBT for work and labor.

Pleas, first, except as to 10*l.* parcel, &c., that the defendant never was indebted; secondly, as to 10*l.* other parcel, &c., payment; thirdly, as to the 10*l.* above excepted, payment into court of 10*l.* 1*s.* in full satisfaction, and that the defendant never was indebted to the plaintiff in more than 10*l.*, in respect of the said sum of 10*l.*, and that the plaintiff had not sustained greater damages by reason of its non-payment than 1*s.* Issue was joined on the first plea. To the second plea the plaintiff replied, traversing the payment alleged; and as to the third plea, that he accepted and took out of court the amount paid in, in satisfaction of the causes of action in that plea alleged, and prayed judgment for his costs and charges in that respect.

On the plea of never indebted, it had been found that the defendant was indebted to the plaintiff beyond the sum of 10*l.*, to wit, 20*l.*, and on the second plea a verdict was found in favor of the defendant. On taxation of costs, the master allowed the defendant all his costs of the suit, deducting only the plaintiff's costs as to the issue upon the plea of never indebted, which alone he allowed to the plaintiff. Subsequently a rule *nisi* for a review of taxation was obtained, on the ground that the master had improperly disallowed the plaintiff's claim to have his costs of the causes of action to which the third issue applied, including the costs of the replication to that plea, under the Rule Trin. term, 1 Vict., which provides that "the plaintiff, after the delivery of a plea of payment into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit, and in case of non-payment thereof within forty-eight hours, to sign judgment for the costs of suit so taxed; or the plaintiff may reply that he has sustained damages, or that the

¹ 20 Law J. Rep. (N. S.) Q. B. 262.

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defendant was and is indebted to him to a greater amount than the said sum, and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit up to the time of the payment into court."

Rochfort Clarke showed cause, (January 31.) According to the old practice, the money paid into court and accepted was considered as struck out of the declaration; 1 Tidd's Practice, 620; and by analogy and reason the same rule may still be applied. The rule of Trin. term, 1 Vict., relied upon, does not provide for the middle course of taxation now sought to be obtained. The case of *Harrison v. Watt*, 16 Mee. & W. 316; s. c. 17 Law J. Rep. (N. S.) Exch. 74, certainly does apply here against the defendant, but not to the extent of entitling the defendant to the general costs. One party cannot be considered as more in the right than the other, up to the time of the payment of the money into court. Where the plaintiff proceeds in the action after payment into court, it shows that the action was substantially and intentionally for an amount beyond the sum paid into court. Here the defendant has really succeeded upon the matter in issue upon the third plea, and should therefore have the general costs of the causes of action in that respect.

Prentice, contra. The plaintiff is at least entitled to his costs of suit up to the time of the plea of payment into court, in respect of the causes of action to which that plea applies. The question turns upon the construction of Reg. Gen. Trin. term, 1 Vict., and the cases of *Harrison v. Watt* and *Goodee v. Goldsmith*, 2 Mee. & W. 202; s. c. 6 Law J. Rep. (N. S.) Exch. 70, there referred to, are express authorities to show that the plaintiff is entitled to the costs as prayed, under that rule. Alderson, B., there says, "If indeed the money had been paid in *generally*, it would have been otherwise; but then it would have become the result of the plea, and would have been different, namely, in favor of the defendant:" the very point afterwards decided in *M'Lean v. Phillips*, 7 Com. B. Rep. 817; s. c. 18 Law J. Rep. (N. S.) C. P. 248. Up to the payment into court the plaintiff was in the right, and from the form of the pleadings he could not help taking the money out of court.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

PATTESON, J. This was an action of debt for work and labor. The defendant pleaded, as to all but 10*l*., never indebted; secondly, as to 10*l*. other than that excepted, payment; thirdly, as to the 10*l*. excepted, payment into court of 10*l*. 1*s*., and that he never was indebted to the plaintiff in more than 10*l*. as to the said sum of 10*l*., and that the plaintiff had not sustained greater damages than 1*s*. as to the detention of that 10*l*. The plaintiff replied, joining issue on the plea of never indebted, and traversing the plea of payment, and

¹ LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and WIGHTMAN, JJ.

Rumbelow v. Whalley.

as to the plea of payment into court, accepting the sum paid in, and praying judgment for his costs in that respect. At the trial the jury found for the plaintiff, on the plea of never indebted, to the extent of 10*l.* beyond the sum paid into court, and for the defendant on the plea of payment. The master, on taxation, has allowed the defendant all the costs of suit, deducting only the plaintiff's costs as to the issue on the plea of never indebted. In so doing he has followed the last decision at chambers in this court, though there had been one or more former decisions the other way. A rule *nisi* was obtained for reviewing the taxation, by disallowing the defendant all his costs, anterior to the plea of payment of money into court, so far as relate to the causes of action to which that plea was pleaded, and allowing the plaintiff all his costs as to such causes of action up to and including the payment into court.

The question turns upon the rule of Trin. term, 1 Vict. [His lordship read the rule.] By the language of this rule it is plain that it contemplates the payment into court, either in respect of the whole causes of action or in respect of a part only of them selected by the defendant, and in either case it gives the plaintiff his costs of suit, if he accepts the money so paid into court in discharge. It is equally clear that it gives the defendant his costs of suit only where the plaintiff replies damages or a debt to a greater amount, and there is an issue *thereon*, that is, on such allegation, of greater amount. In the present case there is no such issue, therefore it is not within the words of the latter part of the rule, but it is within the words of the earlier part of the rule, because the plaintiff has accepted the money in discharge of the cause of action in respect of which it was paid in. To such a plea as the present the plaintiff could not reply a greater amount of debt, since it is impossible for a person to be indebted in more than 10*l.* in respect of 10*l.* The defendant by adopting this form of plea has insulated (to use the expression of Parke, B., in *Harrison v. Watt*) one part of the declaration from the rest, and so prevented the raising such an issue as would under the latter part of the rule, if found for him, have given him the costs of suit. If he had pleaded to the whole declaration payment into court of 10*l.* 1*s.* and no debt ultra, he would have driven the plaintiff either to accept that sum in discharge of the whole causes of action, or to have replied a debt ultra, and so incurred the risk of having to pay all the costs of suit, if he had failed upon that issue. Here, the defendant could not so plead, because he was indebted at one time in a greater amount than the sum paid into court, and was obliged to plead an affirmative plea to get rid of that greater amount, which affirmative plea could not be joined with a plea of payment into court to the whole declaration. It comes to this, therefore, that whenever the only question intended to be raised by the pleadings is the amount of the original debt, the defendant can put the plaintiff to the alternative of accepting in discharge of his whole demand whatever sum he chooses to pay into court, or to proceed for more at the risk of the costs of the suit. But whenever the original debt is larger than the sum which the defendant chooses to pay as a balance, and

Regina v. Sidney.

thus he is obliged to plead an affirmative plea or pleas to reduce the original debt to such balance, he necessarily insulates the sum so paid in from the rest of the declaration, and so entitles the plaintiff to accept it in discharge of the cause of action in respect of which it is paid into court, and to receive all costs of suit thereon.

The authorities are quite in accordance with this view of the question. The case of *Harrison v. Watt* is identical with the present case in all points. *Goodee v. Goldsmith* is to the same effect, and the recent case of *M'Lean v. Phillips* proceeds on the very distinction above pointed out, although it was not expressly noticed by the court. Neither is that distinction a frivolous one with reference to the present rule of court, as, at first sight, might perhaps be thought. Suppose a declaration for goods sold and delivered, and for work and labor. The defendant pleads payment into court as to the goods, and never indebted as to the work and labor. The plaintiff accepts the money paid, in discharge of the count for goods sold, and proceeds as to the work and labor, and fails. It seems clear that under the rule in question he would be entitled to his costs as to the goods. But suppose a defendant had paid a sum into court in respect of both demands, and the plaintiff had gone on for a larger amount and failed, he would be precisely within the words and meaning of the latter part of the rule. Whether it would be right to alter the rule, and give the plaintiff his costs at all events up to the time of payment of money into court, so far as relates to the causes of action in respect of which it is paid in, (since it appears plain that he was right in bringing an action,) is not for us to determine. But as the rule now stands, we are of opinion that such a case as the present is not within the latter part of the rule, though it is within the former, and that the taxation must be reviewed in the manner prayed. It is not contested that the defendant is entitled to the costs subsequent to the payment into court, which he has on other rules and other grounds, independent of the rule which we have been called upon to interpret.

Rule absolute.

REGINA v. SIDNEY.¹

Bail Court, Hilary Term, January 31, 1851.

*Costs — Quo Warranto — Town Councillor — Candidate —
Resignation.*

S. and H. were rival candidates for the office of town councillor of a borough. An objection was taken at the election to the validity of certain votes in S.'s favor, which turned the election. The mayor overruled the objection, and S. took his seat. The rival candidate obtained a rule *nisi* for an information in the nature of a *quo warranto* against S. The latter thereupon declined to show cause, and expressed a willingness to resign his seat:—

Held, that S. was liable to the costs of the information, as he had been a candidate for the office.

¹ 20 LAW J. Rep. (N. S.) Q. B. 269.

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IN this case a rule *nisi* had been obtained for an information in the nature of a *quo warranto*, calling upon one Sidney to show by what right he held the office of councillor of the borough of Wakefield.

Sidney, it appeared, had been a candidate for the office of councillor of the borough, and was declared elected by a majority of votes. An objection had been taken at the time of his election to certain votes in his favor, which if invalid would have left Sidney in a minority, and given a majority to the other candidate, Holdsworth, on whose behalf the application was made. The mayor decided the point in Sidney's favor and against his opponent; and Sidney, in consequence, made the necessary declaration and took his seat as a town councillor. On the rule coming on for argument, Sidney's affidavit was read. He did not attempt to support the validity of these votes; but stated that he had accepted the office in the belief that he would have been liable to a heavy fine if he had refused, and expressed his willingness to resign or disclaim.

Cowling now showed cause. It is not intended to resist this motion. Sidney is desirous of resigning. The rule he admits must be made absolute. The only question is as to the costs. Sidney ought only to pay the costs up to the time of his resignation. In *The Queen v. Appleyard*, (not yet reported,) where the party offered to resign, the Court of Queen's Bench made the rule absolute on these terms.

[*Erle, J.* Sidney was a candidate for the office. Where a party in his private capacity claims an honor which is a matter of value to him, and enters into a contest respecting it, if he be wrong in his claim, he ought to pay the costs occasioned by his wrongful claim.]

Crompton, in support of the rule. It would be hard if a private party, who is in the right, should have to pay the costs of these proceedings. The prosecutor is entitled to his full costs, as Sidney cannot resign so as to let the prosecutor into the office, except by entering a valid disclaimer on the record of the information in the nature of a *quo warranto*.

ERLE, J. This is a question between rival candidates for the office of town councillor. Sidney does not now maintain his claim, and is willing to resign. But he cannot by a simple resignation do more than give rise to a new election. He cannot restore the other to his rightful position. He cannot let his opponent into his seat. The rule must be made absolute as prayed.

*Rule absolute.*¹

¹ See *Regina v. May*, 20 Law J. Rep. (N. S.) Q. B. 268; s. c. 15 Jur. 129; 2 Eng. Rep. 284.

Roberts & others v. Tucker.

IN THE EXCHEQUER CHAMBER.

ROBERTS & others v. TUCKER.¹

Hilary Vacation, February 1, 1851.

Bill of Exchange accepted payable at Bankers' — Payment on forged Indorsement — Liability of Banker.

If a bill of exchange, made payable to order, be accepted payable at the acceptor's bankers', and the indorsement of the payee be forged, and the bankers pay the bill to a party presenting it for payment, they are guilty of no breach of duty towards the acceptor in making the payment; but they are not at liberty to charge the amount of the bill in account against him, although the payee be a stranger to them, and they have no immediate means of ascertaining the genuineness of his handwriting, and have dealt with the bill in the ordinary course of business.

Semble, the bankers have a reasonable time to inquire into the genuineness of the indorsements of strangers necessary to make out the title to the bill.

ERROR from the Court of Queen's Bench.

This was an action, on behalf of the Pelican Life Assurance Company, against the defendants, their bankers, to recover from the latter the amount of a bill of exchange, drawn payable to the order of certain persons whose indorsements were forged, and accepted by the Pelican office, payable at the defendants'. The defendants had paid the bill to the parties presenting it, and sought to debit the Pelican office with the amount.

The pleadings and principal facts of the case are fully stated in the report of the proceedings in the court below, 18 Law J. Rep. (N. S.) Q. B. 169, which ended in the court granting a new trial.

On the new trial, the same facts were, in substance, given in evidence.

On the new trial it was shown that it was the practice of the Pelican office, before accepting any bill of exchange drawn for a loss, to examine it with a view of seeing whether the signatures of the payees were upon it and were genuine; and it was proved that, with respect to this bill, the duly authorized clerk of the Pelican Life Assurance Company had examined it, and that after he had been satisfied that the requisites had been complied with, the bill was accepted by two of the directors of the Pelican Life Assurance Company. It was not proved that this practice of the Pelican Life Assurance office of examining the bill was communicated to the defendants. The learned judge told the jury that the defendants were guilty of a breach of duty to the Pelican Life Assurance office in paying the bill with the forged indorsement; that the defendants were responsible for making the payment to parties not entitled; that there was no evidence to exempt the defendants from the ordinary liability of bankers, and that the plaintiff was entitled to recover the amount of the bill on the count for money had and received.

¹ *Coram* PARKE and ALDERSON, BB., MAULE and CRESSWELL, JJ., PLATT, B., TALFOURD and WILLIAMS, JJ. 20 Law J. Rep. (N. S.) Q. B. 270.

The jury found for the plaintiff on both counts. A bill of exceptions was tendered to the ruling of the learned judge.

Sir F. Thesiger (*Barstow* with him) for the plaintiffs in error, the defendants below. The plaintiffs in error are not liable to this action on two grounds. First, it is apprehended, on general principles, that where an acceptor of a bill of exchange accepts the bill payable at his bankers, and the banker pays it when due to a party presenting it as the lawful holder, and it turns out that any necessary indorsement is forged and the holder consequently has no title to the bill, the banker is not liable to pay the amount over again to the acceptor, provided the banker has used ordinary skill and prudence in ascertaining the genuineness of the indorsements on the bill. Secondly, it is contended that, under the particular circumstances of this transaction, the Pelican Life Assurance office gave authority to their bankers to pay this bill of exchange. With respect to the first point, it is contended on the other side, that a banker is bound at his own peril to ascertain the title of the party presenting the bill for payment. It has often been assumed that such an obligation attaches on a banker; but it is apprehended that there is no authority for the proposition that if a banker pays such a bill on a forged indorsement he is liable over to his customer. Bills come to a banker's with indorsements on them from all parts of the world: the banker must pay the bill on the very day on which it is presented, or declare whether the bill is dishonored or not. It is impossible within the space of one day for the banker to ascertain the genuineness of the indorsements; and yet if he do not pay on the day, the bill is dishonored, and he is liable to an action at the suit of the customer if the bill be genuine. *Cocks v. Masterman*, 9 B. & C. 902; s. c. 8 Law J. Rep. K. B. 77; and *Marzetti v. Williams*, 1 B. & Ad. 415; s. c. 9 Law J. Rep. K. B. 42.

[*Maule, J.* Notwithstanding those cases, I conceive that if a bill were presented to a banker by a stranger, with an indorsement on it of a person necessary to make out the title, but unknown to the banker, the banker would be justified in refusing to pay at once.

Parke, B. Probably in such a case the obligation would be to pay in a reasonable time.]

Money deposited with a banker is money lent, with the superadded obligation of being liable to be called for by check. *Pott v. Clegg*, 16 Mee. & W. 321; s. c. 16 Law J. Rep. (n. s.) Exch. 210. It is conceded that if a banker pays a forged acceptance or a forged check he is liable over to his customer, for he is bound to know the handwriting of his customer. *Smith v. Mercer*, 6 Taunt. 76. That case decides that ignorance of the customer's handwriting is negligence on the part of the banker; but it cannot, with any reason, be supposed that the banker can know the handwriting of indorsers who are perfect strangers. *Foster v. Clements*, 2 Camp. 17, is the only authority in favor of the general proposition; but in that case it appears that the bankers had no effects of their customer in their hands at the time they chose to pay the check, and they afterwards sought to charge him with the

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amount. There was, therefore, good reason to hold in that case that the banker must prove that he had a particular authority from the customer to make the payment. It is not necessary to dispute the authority of *Hall v. Fuller*, 5 B. & C. 750; s. c. 4 Law J. Rep. K. B. 297, which lays down the general proposition, that a banker undertakes to pay according to his customer's order. *Scholey v. Ramsbottom*, 2 Camp. 485, has no bearing on the present case. Secondly, under the particular circumstances of this case, the bankers were not liable over. It is admitted that in general the acceptance of a bill of exchange is a mere admission on the part of the acceptor of the handwriting of the drawer and of his capacity to indorse, but it is not an admission of the genuineness of the indorsement, even though the indorsement be on the bill before the acceptance. *Smith v. Chester*, 1 Term Rep. 654. *Carvick v. Vickery*, 2 Dougl. 653. *Robinson v. Yarrow*, 7 Taunt. 455. *Bosanquet v. Anderson*, 6 Esp. 43. *Cooper v. Meyer*, 10 B. & C. 468; s. c. 8 Law J. Rep. K. B. 171. But in this particular case the document was not a bill of exchange, as between Tate the drawer, and the Pelican Life Assurance Company the drawee. It was merely an order from the company to one of their servants to draw upon them. *Miller v. Thomson*, 3 Man. & G. 576; s. c. 11 Law J. Rep. (N. S.) C. P. 21. It is found as a fact that the Pelican Life Assurance Company never accepted a bill of exchange without having previously on the bill the indorsements of the party entitled to the amount insured. Therefore, the party so entitled may be looked upon as in reality the drawer of the bill, and if so, the company, by accepting the bill with the forged indorsement of the party so entitled, stands, it is contended, in the same position as if the name of the drawer on the bill had been forged, and therefore they cannot now dispute its genuineness. Every indorsement is a new drawing. *Allen v. Walker*, 2 Mee. & W. 317; s. c. 6 Law J. Rep. (N. S.) Exch. 78, and *The Queen v. Winterbottom*, 2 Car. & K. 37. Again, it is found as a fact that the Pelican Life Assurance Company, before accepting any bill, were in the habit of examining as to the genuineness of the indorsements, and that course was pursued with respect to this particular bill.

[*Parke, B.* It is not found that this practice of the Pelican Life Assurance Company was communicated to the bankers. You have to show that there is some evidence for the jury of an authority from the company to the bankers to pay this bill.

Maule, J. The Pelican Life Assurance Company were not bound to take any trouble on that point: any inquiry that they made as to the genuineness of the indorsements was doing service to the bankers behind their backs.]

The general course of business of the company is some evidence to go to the jury, though not shown to be communicated. It was held, in *Hankey v. Wilson*, Sayer, 223, that there was some evidence for the jury of the indorsement of a bill of exchange when the accepters had accepted it after the indorsements had been made. Where the conduct of the customer is such as to facilitate fraud, the banker is exonerated if he pay on a forged acceptance or indorsement.

Roberts & others v. Tucker.

Young v. Grote, 4 Bing. 253; s. c. 5 Law J. Rep. C. P. 165. Byles on Bills, p. 17. The practice of the company with respect to country losses was such as to facilitate fraud.

Sir F. Kelly, Bramwell, and Pitt Taylor, for the defendant in error, were not called on.

PARKE, B. In the ordinary case of a bill accepted by a party payable at his banker's, there is no question that the acceptance making it payable at the banker's is tantamount to an order to the banker to pay out of the money of the customer to the person who is holder of that bill and who can give a discharge. Therefore, if the bill be specially indorsed, it is an order to pay to the special indorsee; if the bill be indorsed in blank, it is an order to pay to the bearer. A banker cannot discharge himself in account with his customer, except by paying to the person who is lawfully entitled to give a discharge for the amount. That is the case when a bill of exchange is made payable at a banker's. If the banker wishes to protect himself, he should take care to cause the accepters of the bill to make the bill payable at their own house, and to give their check on him made payable to bearer, in which case he will be discharged by payment of the check to any one who brings the check to him under circumstances apparently fair. The defendants are in precisely the ordinary situation, unless it can be shown that the company had given them any authority to pay the bill. We are all of opinion that there is no evidence that the company had given such authority. The only matter relied on as evidence to that effect was the practice of the company with respect to the examination of the bills before acceptance, but that practice was not communicated to the bankers. The case of *Young v. Grote* is very different from this. There the court held that the check was drawn in so negligent a way as to facilitate the forgery and to exonerate the banker from liability to his customer for paying the amount. They, in truth, consider that he, as it were, gave authority to the party to fill up the check in the way it was filled up. No such objection is open as to the check in this case. We all think that this is nothing more than the ordinary case of a bill made payable at a banker's, and that the plaintiff is entitled to recover on the count for money had and received. The special count is not proved, for the bankers were not guilty of any breach of duty in paying the bill, and we think that the learned judge was wrong in respect of it; but that will be cured by entering a *remittitur damna* as to that count.

Judgment affirmed accordingly.

Phipps v. Daubney.

IN THE EXCHEQUER CHAMBER.

PHIPPS v. DAUBNEY.¹

Hilary Vacation, February 3, 1851.

Attorney's Bill — Charging Railway Company — Provisional Committee-man — Delivery of Bill.

The defendant was a member of the provisional committee of the Northampton, Lincoln, and Hull Railway Company. The plaintiff, an attorney, who had been employed by the company, delivered his bill of charges, headed "Northampton, Lincoln, and Hull Railway to R. H. Daubney, debtor:—"

Held, that it sufficiently charged the defendant within the meaning of the statute 6 & 7 Vict. c. 73, s. 33.

It is not a sufficient delivery of a bill of costs within the statute for the attorney to show it to the party charged, and then to take it away again, unless the attorney showing it intends to leave it with the party, and merely takes it back at his request.

ERROR from the Court of Queen's Bench.

Debt, by Robert Heaford Daubney against John Phipps, for work and labor as an attorney.

Plea — No signed bill of charges delivered to the defendant, or sent by post to him or left for him at his country-house, one month before action brought, according to the statute.

Replication, that the plaintiff did, one month before the commencement of the suit, deliver to the defendant a bill of charges, &c., pursuant to the statute.

On the trial, at Westminster, before Erle, J., on the 14th of February, 1850, it was proved that the work and labor done by the plaintiff as attorney or solicitor was performed for a certain railway company, provisionally registered in the name of "The Northampton, Lincoln, and Hull Railway Company," of which company the defendant was a member, and also acted as a member of the provisional committee; that one G. Pell was the attorney of the company, and had employed the plaintiff to do the work of the company; that the plaintiff, in March, 1846, more than one month before action brought, had sent by post to G. Pell his, the plaintiff's, bill of costs for the work, which was duly signed. The bill was headed thus: "Northampton, Lincoln, and Hull Railway to Robert Heaford Daubney, debtor."

It was also proved that one J. H. Daubney, in December, 1846, gave a copy of the bill of costs, duly signed by the plaintiff, to the defendant, who then looked over the same, and said to J. H. Daubney, that he, the defendant, had seen that bill before; that some of the charges were high, but that it was not intended to dispute them. That two other members of the provisional committee of the same company came into the room in which J. H. Daubney and the

¹ *Coram* PARKE and ALDERSON, BB., CRESSWELL, J., PLATT, B., WILLIAMS and TALFOURD JJ., and MARTIN, B. 20 Law J. Rep. (N. S.) Q. B. 273.

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defendant were, shortly after the bill had been so handed to the defendant; that the said last-mentioned bill was then before them; that one of them said to J. H. D., in the presence of the defendant, that it was not intended to dispute the charges of the said bill, but that it was determined not to pay one local agent before another, and that, after some more conversation on the subject, the said last-mentioned copy of the said bill was taken away by the said J. H. D.; that the defendant and other provisional committee-men said that inquiry should be made of Mr. Pell as to the state of the funds, and that an answer should be sent to the plaintiff.

The counsel for the defendant objected that the bill of costs was not a sufficient bill within the statute, not being directed to the defendant as the party charged, and that there was no evidence of any delivery of the bill of costs to him.

The learned judge ruled that the bill was sufficient, and that there was evidence of delivery of the bill. A bill of exceptions was thereupon tendered, which stated the above-mentioned facts. The jury found for the plaintiff.

The case was argued by

Mellor, for the plaintiff in error. There are two objections to the right of the plaintiff below to recover. First, there is no evidence of the delivery of a signed bill of costs to the defendant one month before action brought; secondly, the bill of costs which was delivered to Pell was not a bill by which the defendant was charged. First, the plaintiff was not employed by the defendant. His retainer was by Pell, and the delivery of the bill was to Pell. It is conceded that, according to the statute and the cases, a delivery to an agent authorized by the party charged to receive the bill for him would be sufficient. *Macgregor v. Keily*, 3 Exch. Rep. 794; s. c. 18 Law J. Rep. (N. S.) Exch. 391. *In re Bush*, 8 Beav. 66; s. c. 14 Law J. Rep. (N. S.) Chanc. 6. *Vincent v. Slaymaker*, 12 East, 372; but there is no proof that Pell was authorized by the defendant to receive the bill for him. Pell was not the defendant's private attorney. He was simply attorney to a company provisionally registered, whose object was to obtain the formation of a railway. The defendant, it is true, was a member of that company, but a company for the formation of a railway is not an ordinary partnership, is not a trading company, and individual members are not liable for the acts of the company, except so far as they individually consent to such acts. *Edwards v. Lawless*, 6 Com. B. Rep. 329; s. c. 16 Law J. Rep. (N. S.) C. P. 293, shows that delivery of a bill to one provisional committee-man of a projected railway company is not a delivery to another member. What took place at the meeting at which the defendant attended was no sufficient delivery of the bill to him, because the bill of costs, though shown to him, was taken back by the plaintiff. In order to constitute a delivery of the bill of costs within the meaning of the statute, the attorney must not only show the bill to the party charged, but must leave it with him. *Crowder v. Shee*, 1 Camp. 437. *Brooks v. Mason*, 1 H. Black. 290. *Eicke v. Nokes*,

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Moo. & M. 303. *Eggington v. Cumberledge*, 1 Exch. Rep. 271; s. c. 16 Law J. Rep. (N. S.) Exch. 283. The decision in *Daubney v. Phipps*, 18 Law J. Rep. (N. S.) Q. B. 337, proceeded upon a mistake as to the facts on the part of the court. In *Blandy v. De Burgh*, Ibid. C. P. 2, where the bill of costs was left at the office of a provisionally registered railway company, the court were divided in opinion as to whether that was a sufficient delivery to fix the defendant, who was a member of the provisional committee.

Secondly, the bill does not charge the defendant. It is simply headed "Northampton, Lincoln, and Hull Railway to Robert Heaford Daubney, debtor," — that is in effect saying that the bill is in respect of the affairs of the railway, but it does not charge any one. It does not even charge the railway company, for the word "company" is not inserted. The railway cannot be a debtor to the attorney.

[*Cresswell, J.* A shipwright often makes out his bill charging the ship as his debtor.]

The first statute on the subject of attorneys' bills of costs, the stat. 3 Jac. 1, c. 7, s. 1, requires that before bringing an action all attorneys and solicitors shall give a true bill unto their masters or clients, &c., of all charges, &c., before, &c., they shall charge their clients with any such fees or charges. That statute was followed by the stat. 2 Geo. 2, c. 23, s. 23, which provides that no attorney shall commence or maintain any action for his fees, until the expiration of a month after he "shall have delivered unto the party or parties to be charged therewith" a bill of such fees, charges, or disbursements. The statute now in force, the 6 & 7 Vict. c. 73, in sect. 37, enacts that no attorney shall maintain an action for costs "until the expiration of one month after such attorney shall have delivered to the party to be charged therewith," &c., "a bill of such fees, charges, or disbursements." It goes on to provide, that "upon the application of the party chargeable by such bill" it may be referred to the master for taxation. There is nothing to show that the plaintiff intended to charge the defendant.

[*Cresswell, J.* The work was done for the company, of which the defendant was a member.]

The attorney must point out whom he charges. Great particularity is required in the form of bills of costs. *Gridley v. Austen*, 18 Law J. Rep. (N. S.) Q. B. 337. *Ivimey v. Marks*, 16 Mee. & W. 843; s. c. 17 Law J. Rep. (N. S.) Exch. 165. This company not being a partnership or trading company, but an incorporated company provisionally registered, the court cannot say that the defendant is liable for work done for the company. To satisfy the statute, the bill should have been addressed to him. *Manning v. Glyn*, 1 Jones Exch. Rep. (Irish) 513. *Taylor v. Hodgson*, 3 Dowl. & L. P. C. 115; s. c. 14 Law J. Rep. (N. S.) Q. B. 310. *Edwards v. Lawless*.

Whitehurst, for the defendant in error. There was a sufficient delivery of the bill. Pell was the attorney of the company; he was, therefore, the agent of the company. The defendant was a member of the provisional committee, by whose directions Pell gave orders to

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the plaintiff to do the work. He was, therefore, the agent of the defendant to receive the bill. Afterwards, the bill was delivered to the defendant personally. He then stated that he had seen the bill before, thus showing that Pell had delivered it to him, so that if Pell were to be considered as the agent of the plaintiff to deliver the bill to the defendant, there would be evidence of a delivery by Pell to the defendant. At the same meeting, the defendant looked over the bill, and said that he had examined it and did not mean to dispute the items. *Eggington v. Cumberledge* is a decisive authority that there was a sufficient delivery. (He was here stopped by the court.)

Mellor replied.

PARKE, B. We are all of opinion that the ruling of my brother Erle was correct, and that the judgment of the Court of Queen's Bench must be affirmed. The question arises upon the replication to the plea, which alleges that there was no delivery of a signed bill of costs. The replication states that the plaintiff did one month before the commencement of the action deliver to the defendant a bill of charges of fees and disbursements in the plea mentioned, subscribed with the proper hand of the plaintiff, pursuant to the statute. It appears upon the evidence as set forth in the bill of exceptions, that a bill of the plaintiff's charges as attorney was sent by him to Pell at Pell's request, the latter, as attorney of the company, having employed the plaintiff, also an attorney, to do work for the company. The bill was headed thus: "Northampton, Lincoln, and Hull Railway to Robert Heaford Daubney, debtor." After that, a meeting took place at which the defendant was present, and at which a copy of the bill signed by the plaintiff was produced. The defendant looked the bill over, and said he had seen that bill before, and that he did not intend to dispute the items; other members came in and the matter was discussed between them, and ultimately the bill was taken away by J. H. Daubney. There is, therefore, evidence that the defendant had the bill of costs in his possession, and that, after some conversation on the subject, the copy was taken away. The learned judge ruled that there was evidence of a sufficient delivery of the bill, and gave his opinion that the bill in its present form would satisfy the requirements of the statute. Now, with respect to the form of the bill, it is contended by Mr. Mellor that the statute requires that not merely a list of charges should be made out, but that the bill must state one party to be creditor and another party debtor, and he contends this has not been done in the present case, and he cited the authority of *Manning v. Glyn*. No doubt that decision is perfectly correct, but in that case the bill had no heading at all.

The question here is, whether, on reading the bill, some person is not shown to be intended to be made debtor. The bill is headed not merely "Northampton, Lincoln, and Hull Railway," but "Northampton, Lincoln, and Hull Railway to R. H. Daubney, debtor." We think that this heading does sufficiently import that the plaintiff meant to charge all the persons responsible for the work done for the

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Northampton, Lincoln, and Hull Railway. It therefore, in our opinion, sufficiently charges the defendant. The only remaining question then is, whether there is sufficient evidence to go to the jury that the bill of charges were delivered to the defendant. It is contended that the delivery to Pell was not sufficient to satisfy the statute; and some of us entertain a doubt whether that would have been sufficient had the case turned on that delivery alone. But there is some evidence that Pell delivered the bill to the defendant, for the defendant says that he had seen the bill before and had examined it. Some of us think that that would be evidence to show that Pell was authorized by the defendant to receive the bill for him. That would bring the case within the authority of *Vincent v. Slaymaker*, where it was held that delivery to an attorney who had been substituted for the original attorney was sufficient. I must say for myself, that I entertain some doubt whether the delivery to Pell would have been sufficient to charge the defendant. But we all of us think that the putting the bill into the hands of the defendant at the interview was evidence to go to the jury of a delivery to him. On the facts laid before the jury with respect to that meeting, the jury might have concluded that the bill was only shown to the defendant, and that the plaintiff intended to take it back again, or they might have drawn the conclusion that the plaintiff said to the defendant "You may take the bill if you like," and that the defendant said, "As I do not intend to dispute the charges, you may take it back again." It was a question for the jury whether the defendant was at liberty or not to have kept the bill. In the one view of the case, there would have been a good delivery of the bill; in the other, there would not. We all think that the learned judge was right in saying that there was sufficient evidence for the jury.

Judgment affirmed.

DOE d. LORD ASHBURNHAM v. MICHAEL.¹

Hilary Vacation, February 12, 1851.

Mis-trial — Special Jury — Juror answering to wrong Name — Objection before Verdict — Venire de novo.

Just before the verdict was delivered in a special jury cause, it was discovered that one of the special jurors impanelled had been summoned in another cause, and had by mistake answered to a wrong name. The defendant then objected to the verdict being received, and thereupon the learned judge offered to discharge the jury and try the cause over again. This, however, was not assented to, and the plaintiff claiming to have the verdict taken, the jury ultimately returned their verdict in favor of the plaintiff:—

Held a mis-trial; and that as the defect had been discovered and objected to before the verdict was given, the court was bound to award a *venire de novo*.

On the trial of this cause, before Parke, B., and a special jury, at the last Brecon Summer assizes, the jury retired to consider of their

¹ 20 LAW J. REP. (N. S.) Q. B. 276.

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verdict, and when, on their return into court, their names were being called over, it was discovered that one of the jurymen had answered to, and been impanelled under, a wrong name. The jurymen's name was Williams, and he was a wine merchant in High Street, Brecon, and had been summoned as a special juror in another cause. The name and description he had answered to was that of "Wane, wine merchant, High Street, Brecon," and it appeared that he had been misled by hearing only the description called out by the officer. On the part of the defendant, it was objected that the verdict of the jury ought not to be received; and thereupon the learned judge offered to discharge the jury, and try the cause again with a properly impanelled jury. The plaintiff refused to give his consent to that, and claimed to have the verdict received, and ultimately a verdict was returned in favor of the plaintiff, subject to the defendant's right to avail himself of the objection. In Michaelmas term last, the defendant obtained a rule *nisi* to set aside the verdict, and for a *venire de novo*.

J. Evans and *H. Jones*, Serj., (February 11,) showed cause. The leading case on this subject is *Hill v. Yates*, 12 East, 229, where the fact of a juror's answering to a wrong name was held no ground for disturbing the verdict, although not summoned or qualified. The case of *Dovey v. Hobson*, 6 Taunt. 460; s. c. 2 Marsh. 154, is certainly a strong authority against the plaintiff; but that case was referred to in *Earl Falmouth v. Roberts*, 9 Mee. & W. 469; s. c. 11 Law J. Rep. (N. S.) Exch. 180, and *Gee v. Swann*, Ibid. 685; s. c. 11 Law J. Rep. (N. S.) Exch. 291, and those cases are rather authorities in favor of the plaintiff. The case of *Torbock v. Lainy*, 5 Jurist, 318, is not applicable to the present; and *Haldane v. Beauclerk*, 6 Dowl. & L. P. C. 642; s. c. 18 Law J. Rep. (N. S.) Exch. 227, decides only that the special jury struck must, under the 6 Geo. 4, c. 50, be the jury returned to try the cause. Here the special jury struck was the jury returned, and it is a very common practice to make up the number of jurymen in a special jury cause with talesmen.

[*Coleridge, J.* The law allows of other qualified persons being sworn as talesmen. They are returned by the sheriff, and the names of these who are sworn are annexed to the former panel. I do not see how that helps the case at all.]

In the case of *The King v. Tremearne*, 5 B. & C. 254; s. c. 4 Law J. Rep. K. B. 157, which may be relied upon, the party who served on the jury was not qualified as a jurymen. All the cases from *Hill v. Yates* downwards show that this is entirely a matter of discretion with the court, and under the circumstances a *venire de novo* ought not to be granted. There is no pretence of any injustice having been done.

Benson, contra. The court has no discretion in a case like the present; but if so, that discretion will be governed by the decided cases. The case of *Dovey v. Hobson* is exactly in point. *Norman v. Beaumont*, Willes, 484, is also a strong authority, and the distinction between that case and *Wray v. Thorne*, Ibid. 488, is pointed out in the

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latter case. *Earl Falmouth v. Roberts* is a very different case from the present, and in *Torbock v. Lainsy* there was nothing to show that the officer had not called out the name of the particular juror. *Hill v. Yates* decides no more than that the objection cannot be made available when taken *after* verdict. In *Haldane v. Beauclerk* the court treated an objection of this kind as one in respect of which they had no discretion. Upon authority, therefore, the objection having been made before verdict, a *venire de novo* ought to be granted.

Cur. adv. vult.

The judgment of the court ¹ was now delivered by

PATTESON, J. In this case, a mistake was discovered at the trial before the verdict was given. It appeared that a juryman, when the name of Wane was called, answered, and the trial proceeded. The jury retired to consider of their verdict, and on their return into court the name of Mr. Wane was again called, but no juryman answered to that name. It then appeared that Mr. Wane was not on the jury, and that a Mr. Williams had answered when the first name was called in the first instance, and he has made an affidavit stating that he appeared and answered, not to the name of Wane, but, being a wine merchant residing in High Street, Brecon, and happening to hear only the words, "wine merchant, High Street, Brecon," called, he fancied his name had also been called, and answered, and was sworn, and did not discover his mistake until after the jury had returned into court, and the names were being called over. When the mistake was discovered, the learned judge offered to try the cause again with a proper jury, but the plaintiff refused, and insisted on the verdict being received. The defendant resisted that, and would consent to nothing, and thereupon the jury returned a verdict for the plaintiff. The defect having been discovered and insisted upon before the verdict was given, we think it is one that cannot be passed over, and that we must make the rule absolute for a *venire de novo*. If it had been discovered after verdict, the question would have been a very different one, and many considerations would have entered into the decision of the question, and might have induced us not to have disturbed the verdict; but clearly there has been a mis-trial, and in the present case we have no alternative but to grant, not a new trial, but a *venire de novo*.

Rule absolute.

¹ PATTESON, COLERIDGE, WIGHTMAN, and ERLE, JJ.

In re George Shaw, Gent., one, &c.

*In re GEORGE SHAW, GENT., one, &c.*¹

Hilary Vacation, February 12, 1851.

Attorney's Bill, Taxation of — Question reserved — Less than One Sixth taxed off — Liability of Client to pay Costs of Taxation.

A judge's order, referring an attorney's bill to taxation, reserved to the client the right of disputing his liability to the whole or any part of it, on certain specified grounds. The order did not contain any direction to the master to tax the costs of the reference, as required by the stat. 6 & 7 Vict. c. 73, s. 37. The master taxed off less than a sixth of the whole bill, and taxed the attorney the costs of the reference:—

Held, that the client was liable to pay the costs of the taxation, whatever might be the event of the questions reserved.

THIS was a rule, calling on the Rev. J. Black to show cause why he should not pay to George Shaw or his agents 47*l.* 16*s.* 8*d.*, being the amount of G. Shaw's costs of taxing his bill of costs, and allowed by the master, less than a sixth having been taken off the said bill on taxation.

The affidavits disclosed the following circumstances: Shaw, who was an attorney, had commenced an action on the 4th of February, 1848, against Black, to recover 1230*l.* 9*s.*, the amount of his bill of costs. A judge's order was obtained by Black on the 25th of February to tax the bills "without prejudice to his disputing the right to recover all or any part of the said bills, on the ground of negligence of the said G. Shaw, or of the same being barred by the Statute of Limitations." It was also ordered "that the master should tax distinctly from the rest such parts of the said bills as are disputed on the ground of negligence."

There was no clause in the judge's order directing the master to tax the costs of the taxation. The master taxed off a sum less than one sixth of the total amount of the bill, and found that there was due to Shaw, including the costs of taxation, which amounted to 47*l.* 16*s.* 8*d.*, the sum of 950*l.* 10*s.* 9*d.*, of which items to the amount of 178*l.* 19*s.* 6*d.* were disputed on the ground of negligence. Black paid money into court in this action as well as in another, which, by arrangement between the parties, was brought against him for part of the same bills. These payments, together with a sum found due from him to Shaw, under a reference of the first-mentioned cause, amounted altogether to the sum of 956*l.* 10*s.* 9*d.*, less the sum of 47*l.* 16*s.* 8*d.*, the costs of the taxation.

Lush showed cause, (January 31.) As the judge's order does not contain any direction to the officer to tax costs, he had no authority to make the taxation under the statute 6 & 7 Vict. c. 73, s. 37. The court has no power to order the client to pay them.

Bramwell. The statute directs that the costs of such a reference

¹ 20 Law J. Rep. (N. S.) Q. B. 280.

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as this shall be paid according to the event of the taxation. It, therefore, was not necessary, in order to give the attorney a right to the costs of the taxation, that the order should contain any direction to the master to tax the costs. It might here not be right that it should be inserted, because, in certain cases, the master is to be at liberty to state special circumstances to the court, and the court may then make such order as they think right respecting the payment of the costs of taxation. Besides, it is too late to take the objection. The parties have attended before the master, and acted as if the judge's order contained the clause directing the taxation.

Cur. adv. vult.

ERLE, J. now said: In this case the question is, whether the defendant is liable to the costs of taxing the plaintiff's bill, less than one sixth having been taken off. He contends that he is not, because the order for taxation does not contain an order imposing such liability, according to the direction of the statute. But, as the statute imposes the liability absolutely, in the event that has happened, I think the omission in the order does not of itself exempt from the liability so imposed. If it had appeared that the parties intended that no such liability should be imposed, this rule would have been discharged; but the reverse appears to have been the truth. I am further of opinion that if a client chooses to have an attorney's bill taxed, reserving to himself a right to dispute liability to the whole or part thereof, either in respect of no retainer or misconduct, he is liable for the costs of such taxation notwithstanding such reservation, and whatever may be the event of the question so reserved, which in this case was decided against the client.

Rule absolute.

REGINA v. THE MAYOR AND ASSESSORS OF THE BOROUGH OF KIDDERMINSTER.¹

Bail Court, Hilary Term, January 28, 1851.

Municipal Corporation — Burgess Roll — Notice of Claim — Local Act — Rating Owners — Composition, Criterion for.

A notice of claim, made under sect. 17 of the 5 & 6 Will. 4, c. 76, to be inserted on the burgess roll of a municipal corporation, must state the parish in which the property is situated in respect of which the claim is made.

By a local act of the borough of K., owners of dwelling-houses within the borough of a less yearly rent than 10*l.* were to be rated to the poor instead of the occupiers. The overseers were, by sect. 2, empowered to compound with the owners at one third the rate where the "annual rent and value" did not amount to 7*l.*, and at one half the rate where the annual rent or value amounted to 7*l.* but did not amount to 10*l.* Sect. 15 provided that nothing in the act was to prejudice or affect any municipal or parochial franchises of the occupiers, but that they might claim to be put on the burgess roll as if that act had not passed, and the occupiers had been rated and assessed to the poor in their own names. M. claimed to be put on the burgess roll of the borough of K. in respect of a house which he occupied as tenant at a yearly rent of 7*l.* The house was stated in the poor rate to be of the gross

¹ 20 Law J. Rep. (N. S.) Q. B. 281.

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estimated value of 6*l.* 10*s.*, and of the ratable value of 5*l.* 4*s.* His landlord had compounded with the overseers at one third the poor rate, and had duly paid his composition. The borough rates of K. were paid out of the poor rates:—

Held, that under the local act the criterion for composition was the rent which could fairly be obtained when the premises were let, or the value for which they could be let when they were vacant; but that the title of the occupier to be put upon the burgess roll would not be affected by any mistake in the amount of the composition between the owner and overseers; that the overseers were entitled to include the borough rate in the composition as part of the poor rate; and that payment of the composition was equivalent to the payment of the borough rate.

THIS was a rule calling on the mayor and assessors of the borough of Kidderminster to show cause why they should not insert the name of R. H. Macdonald upon the burgess roll of that borough.

A local act, 5 & 6 Vict. c. 72, for the better assessing and collecting the poor rate in the borough of Kidderminster, by sect. 1 provides that owners of dwelling-houses situate within the borough, of a yearly rent of less than 10*l.* per year, are to be rated to the relief of the poor instead of the occupiers. Sect. 2 enables the overseers to compound with the owner in the following manner: "Where the annual rent or value of the dwelling-house rated shall not amount to the sum of 7*l.* at any sum not less than one third of the amount of each rate when the annual rent or value of the dwelling-house shall amount to the sum of 7*l.* and shall not amount to the sum of 10*l.*" Sect. 15 enacts "that nothing in this act contained shall prejudice or affect any municipal or parochial franchises to which the occupiers of any dwelling-house within the said borough would be now entitled, but that such occupier shall and may claim to be put upon the burgess list and exercise any such franchises in the same manner to all intents and purposes as he might or could have done before the passing of this act, as if he had been rated and assessed in his own name." By the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, s. 9, all resident leaseholders and occupiers of houses and shops rated for three years to the relief of the poor shall be burgesses, provided they have paid all poor rates, "including therein all borough rates, if any, directed to be paid under the provisions of this act." Any person claiming to have his name inserted on the burgess roll is, by sect. 17 of the last-mentioned act, to give notice to the town clerk in writing, according to the form in No. 2, schedule (D,) and the town clerk is to include the names of all such claimants in a list according to No. 5 of the same schedule. Both these forms denote that the names of the parish in which the property is situated in respect of which the claim is made is to be inserted. The borough rates of Kidderminster were included in and paid out of the poor rates.

Macdonald, who held a house within the borough, of one William Powell, at the yearly rent of 7*l.*, sent in to the town clerk a claim to have his name inserted on the burgess roll. The claim stated—"I occupy a house in Stonebridge Street, in the said borough, and my landlord, William Powell, has been rated in respect of the said house from the 31st of December, 1847, up to the present time, during the whole of which time I have occupied the said dwelling-house.

Dated.

(Signed,) "William H. Macdonald."

Regina v. The Mayor, &c., of the Borough of Kidderminster.

The house in question was entered in the rate books as being of the gross estimated value of 6*l.* 10*s.*, and of the ratable value of 5*l.* 4*s.* Powell had compounded with the overseers at one third of the poor rate, and had duly paid his composition.

Crompton showed cause. The notice of claim is defective. It does not state the parish in which the property is situated in respect of which the claim to be inserted on the burgess roll is made. The forms given in schedule D, referred to in sect. 17 of the stat. 5 & 6 Will. 4, c. 76, show that the parish must be specified. Rawlinson on Municipal Corporations, 33. The composition for the rate is not according to the local act. As the rent was 7*l.*, the landlord was not entitled to enter into a composition at less than half the rate. The composition was improperly made for one third the rate, and the landlord only paid one third the rate. The overseers had no authority to compound for a borough rate; the local act limits their functions to the case of a poor rate.

M. D. Hill, in support of the rule. The notice of claim is, it is submitted, not fatal. Even if it be, there are many claims to which this technical objection does not apply, on which the opinion of the court is desired. With respect to the merits of the claim, it is submitted that the applicant is entitled to be enrolled on the burgess list. With regard to the term "rent or value" used in sect. 2, of the local act, it is apprehended that if either the "rent" or the "value" be below 7*l.*, the overseers would be entitled to compound for the rate at one third its amount. Here the value was below 7*l.*, though the rent amounted to that sum. As the borough rate is paid out of the poor rate, it is part of the poor rate; therefore the overseers were fully justified in making the composition. There was a sufficient payment of rates, as payment of the composition is by the act equivalent to paying the whole rate.

Cur. adv. vult.

ERLE, J., now said: On showing cause against a rule for a *mandamus* to place the name of an applicant on the burgess roll, it appeared that the notice of claim was insufficient, as it was not according to the form prescribed by the statute, the parish being omitted. In this respect the title of the applicant failed. It further appeared that the landlord of the applicant had compounded for one third of the poor rate under the stat. 4 & 5 Vict. c. 72, s. 2, and that the rent or value of the house was 7*l.*; but the ratable value in the poor rate itself was stated to be 6*l.*, and it was hereupon contended that as the composition must be for one half where the rent or value is 7*l.* or upwards, this composition was void. I am of opinion that under this statute the rent which can be fairly obtained when the premises are let, and the value for which they could be let when they are vacant, is the criterion for composition under sect. 2. Effect is thus given to the words according to their ordinary meaning, and a complicated inquiry into annual value in any other meaning is prevented. I am further of opinion that the title of the claimant to be on the burgess roll

Regina v. Kelsey.

would not be destroyed by a mistake in the composition. The enactment in sect. 15 provides, that nothing in the act shall affect any municipal franchise to which the occupier would have been entitled if the act had not passed, and the claimant would presumptively have been properly rated if the act had not passed. It further appeared that the borough rate is paid out of the poor rate in the parish in which the house of the applicant is situated; and it was contended that the landlord was not empowered under the act to compound for a borough rate so paid. But I am of opinion that the composition might include all that is assessed under the name of poor rate, and that payment of the composition is a payment of the sum due to the borough fund which might have been levied by a borough rate in the parish of the applicant. It follows that the title of the claimant would have been established if he had given a valid notice of claim; but that the rule must be discharged on account of the defect in such notice, and if the corporation require it, with costs, as they are a public body whose act has been contested without sufficient ground.

Rule discharged.

REGINA v. KELSEY.¹

Bail Court, Hilary Term, January 29, 1851.

Feigned Issue under Enclosure Act — Costs of Proceedings.

Where the court have granted an application for a feigned issue, under the statute 8 & 9 Vict. c. 118, s. 44, to try whether a certain close be part of a particular manor, and the applicant, the plaintiff in the feigned issue, fails on the trial, the court will order him to pay the costs of it to the defendant in the feigned issue.

THIS was a rule calling upon Stephen Kelsey to show cause why he should not pay to the Rev. Ralph Price the costs of the rule for a feigned issue herein, together with the costs of and occasioned by the said issue and of this application. A similar rule was obtained on the part of enclosure commissioners.

An issue had been directed, by Wightman, J., under the stat. 8 & 9 Vict. c. 118, the General Enclosure Act, to inquire whether a certain common, called High Minnis, was part of the manor of East Leigh. Kelsey, the lord of the manor of East Leigh, was the plaintiff in that issue, and Price, the lord of the adjoining manor, the defendant. [The previous proceedings with respect to this question are stated in the report on the application for the *certiorari* to bring up the award of the enclosure commissioners, *Ex parte Kelsey*, 19 Law J. Rep. (N. S.) Q. B. 145, and of the argument before the rule for the feigned issue was made absolute, *The Queen v. Kelsey*, 19 Law J. Rep. (N. S.) Q. B. 523.] A verdict was found for the defendant Price on the trial of the feigned issue at the Kent Summer assizes, 1850.

¹ 20 Law J. Rep. (N. S.) Q. B. 283.

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Shee, Serj., and *Prentice*, showed cause. The question was a fair question of title. There was a great deal of evidence on both sides. The court will not impose all the costs on the plaintiff in the feigned issue.

Deedes, in support of the rule. The matter had been twice before decided in favor of Price, and before the feigned issue was granted. The losing party ought to pay the costs. *The Queen v. Merson*, 3 Q. B. Rep. 895; s. c. 12 Law J. Rep. (N. S.) Q. B. 7, is quite in point.

ERLE, J. This proceeding is, in reality, like an action of trespass between the owners of adjacent manors to try the question whether a particular close be parcel of one or the other manor. In the ordinary case of an action of trespass, the party failing to make out his claim would have to pay the costs. I think that the same rule should apply here. The costs will be granted as prayed for in both rules.

Rules absolute.

THE BANK OF AUSTRALASIA v. NIAS.¹

Hilary Term, January 29, 1851.

Colonial Law, Validity of — Specific Remedy — Judgment, Action upon — Process against Members of Company — Foreign Judgment, Conclusiveness of — Pleading — Judgment recovered.

An act of the colonial legislature of New South Wales enabled the chairman of a company to sue and be sued on behalf of the company, and provided that execution upon any judgment in such an action against the chairman might be issued against the goods, lands, &c., of any member of the company, in like manner as if such judgment had been obtained against him personally:—

Held, first, that the colonial legislature had authority to make such an act, and that it contained nothing repugnant to the law of England or to natural justice.

Secondly, that the specific mode provided for enforcing the judgment by execution against a member of the company could not be obtained against a shareholder out of the colony; but,—

Thirdly, that the judgment against the chairman might be made the foundation of an action against a member beyond the territory of the colony, in the same manner as if he had been personally served and the recovery had been against him as a party to the record.

A foreign judgment is examinable, and is only *prima facie* evidence of debt here, so far as to show that the foreign court had not jurisdiction of the subject matter of the suit, or that the defendant was never served with process, or that the judgment was fraudulently obtained; but is conclusive upon the defendant so far as to prevent him from alleging that the promises upon which it is founded were never made or were obtained by fraud of the plaintiff.

Any pleas which might have been pleaded to the original action cannot be pleaded to the action upon the judgment.

The defendant, being sued as a member of the company upon a contract entered into by the company, pleaded the judgment recovered against the chairman in the colony:—

Held, that the plea was bad.

¹ 20 Law J. Rep. (N. S.) Q. B. 284.

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ASSUMPSIT. The first count of the declaration stated that, whereas, heretofore and before, and at the several times hereafter in this count mentioned, several persons had formed themselves into a company or society established at Sydney, in parts beyond the seas, to wit, in her majesty's colony of New South Wales, under the name, style, and firm of the Bank of Australia, for the purpose of carrying on, at Sydney aforesaid, the trade and business of bankers, and the said company were before and at the said several times hereafter in this count mentioned, so carrying on, at Sydney aforesaid, the said trade and business of bankers as aforesaid; and whereas, after the said formation and establishment of the said company called the Bank of Australia, and whilst the same was carrying on the said trade and business of bankers as aforesaid, and before the bringing of such action as hereafter mentioned, to wit, on the 28th of August, A. D. 1833, a certain act of the governor and legislative council of New South Wales aforesaid was made and passed relating to and concerning the said last-mentioned company, to wit, an act intituled "An Act to enable the proprietors of a certain banking establishment or company carried on in the town of Sydney, in the colony of New South Wales, under the name, style, and firm of the Bank of Australia, to sue and be sued in the name of the chairman of the said bank or company for the time being, and for other purposes therein mentioned." [The declaration then set out the act, the clauses of which are to be found in *The Bank of Australasia v. Harding*, 19 Law J. Rep. (N. S.) C. P. 345.] Averment, that afterwards and before the bringing of such action as hereafter mentioned, and before judgment therein had and obtained as hereinafter mentioned, to wit, on the said 28th of August, 1833, the said act received the royal approbation, and that the notification of such approbation was, to wit, then made by the then governor of New South Wales in the *New South Wales Government Gazette*, and that thereupon the said act then became and was, and from thence continually hath been and still is, the law of and in the said colony, applicable to the said last-mentioned company, and part and parcel of the law of the said colony. And that heretofore and after the said act had become, and whilst the same was such law and parcel of such law of the said colony as aforesaid, and before and at the respective times of the bringing of such action and of the recovery of such judgment as hereafter respectively mentioned, one T. C. Breillat was the chairman of the said last-mentioned company, and the defendant before and at the respective times last aforesaid, and also before and at the times of the making of such promises by the said last-mentioned company as hereafter in this count mentioned, was and from thence respectively hitherto hath been and still is a member of the said last-mentioned company. And that whilst the said T. C. Breillat was the chairman of the said last-mentioned company as aforesaid, and whilst the defendant was a member of the said last-mentioned company as aforesaid, to wit, on the 7th of December, 1844, they, the plaintiffs, caused the said T. C. Breillat, as such chairman of the said last-mentioned company, to be summoned according to the course and practice of the supreme court

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of New South Wales, to appear as the nominal defendant for and on behalf of the said last-named company in the said court, pursuant to the provisions of the act, to answer the plaintiffs in an action on promises; and that afterwards, to wit, on the day and year last aforesaid, the said T. C. Breillat having duly appeared in the said court according to the course and practice of the said court to such last-mentioned summons, they, the plaintiffs, did thereupon then declare in the said action against the said T. C. Breillat as the chairman of the said last-mentioned company, and as the nominal defendant for and on behalf of the said last-mentioned company by virtue of the said act; and that such proceedings were thereupon further had in the said supreme court of New South Wales in the said action that afterwards and whilst the said T. C. Breillat continued to be and was the chairman of the said last-mentioned company, and whilst the defendant continued to be and was a member of the said last-mentioned company, to wit, on the 8th of December, 1845, the plaintiffs, by the consideration and judgment of the said supreme court, recovered against the said T. C. Breillat, as the chairman of the said last-mentioned company as aforesaid, as well a certain sum of 175,703*l.* 18*s.* 7*d.* for the damages which the plaintiffs had sustained by and on account of the non-performance of certain promises before that time made by the said company to the plaintiffs, as also the sum of 2404*l.* 2*s.* for their costs and charges by the said last-mentioned court there adjudged to the plaintiffs with their assent, which said damages, costs, and charges in the whole amounted to 178,108*l.* 0*s.* 7*d.*, whereof the said T. C. Breillat as the chairman of the said last-mentioned company as aforesaid, and as such nominal defendant as aforesaid, was convicted. That the said promises were made, and the plaintiffs causes of action in respect thereof arose within the jurisdiction of the said supreme court of New South Wales aforesaid; and that the said last-mentioned court during all the time whilst the said action was depending therein as aforesaid, and continually until and at the time of the giving of the said judgment, was and is duly holden within the jurisdiction thereof in parts beyond the seas, to wit, at Sydney aforesaid; and that the said judgment was given by the said court at a place within the jurisdiction of the said court, to wit, at Sydney aforesaid, to wit, by the chief justice and other the justices of the said court, to wit, by Sir A. Stephen, knight, chief justice, and J. N. Dickinson, Esq., and W. A'Beckett, Esq., justices of the said court; and that the said judgment still remained in full force and effect, not in any wise satisfied, reversed or annulled, and that no execution had as yet been obtained of or upon the said judgment, and that the damages, costs, and charges aforesaid, in form aforesaid, adjudged to the plaintiffs, were of great value, to wit, of the value of 178,108*l.* 0*s.* 7*d.*, by means of which said several promises the defendant as and being such member of the said last-mentioned company as aforesaid, then became, as such member of the said last-mentioned company, liable to pay to the plaintiffs the said last-mentioned sum of money, when he, the defendant, should be thereunto afterwards requested, and being so liable, and the said last-mentioned sum of

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money then being and remaining wholly due and unpaid, he, the defendant, then, to wit, on the day and year last aforesaid, in consideration of the premises promised the plaintiffs to pay them the said last-mentioned sum of money on request. Yet the defendant hath disregarded his promise, and hath not paid the said last-mentioned sum of money, or any part thereof.

The second count was upon a promissory note made by the defendant, and delivered to the plaintiffs, within the said colony, whereby he promised to pay to the plaintiffs on demand the sum of 154,000*l.*, with interest for the same at the rate of 8*l.* for the 100*l.* for a year from the date of the said note, such last-mentioned rate of interest then being the usual and customary rate of interest in this behalf, and the highest legal rate of interest in the said colony. Breach, that the defendant had disregarded his last-mentioned promise, and had not paid the amount of the said note, or any part thereof.

The third count was for money lent; and the fourth count was on an account stated.

Third plea, to the first count of the declaration, that the said supposed promises in the first count mentioned for the non-performance whereof the plaintiffs are alleged to have recovered judgment against the said T. C. Breillat, as the chairman of the said company of the Bank of Australia, were not made by the said company *modo et forma*.

Sixth plea, to the first count, that the defendant was not at any time arrested upon or served with any process issuing out of the said supreme court of New South Wales, at the suit of the plaintiffs, for the cause of action upon which the said judgment was obtained as in the said first count mentioned, nor had the defendant at any time notice of any such process, nor did the defendant at any time appear in the said court to answer the plaintiffs in the said action on which the said judgment was so obtained; nor had the defendant any knowledge or notice of the said proceedings in the said first count mentioned against the said T. C. Breillat, on which the said judgment was so obtained as in the said first count mentioned; nor had the defendant notice, nor did he know that the said plaintiffs had caused the said T. C. Breillat to be summoned according to the course and practice of the said supreme court of New South Wales to appear as the nominal defendant for and on behalf of the said company of the Bank of Australia in the said action on which the said judgment was so obtained as aforesaid, or that the said T. C. Breillat had duly appeared in the said court, according to the course and practice of the said court, to such last-mentioned summons, whereby the said judgment so made and pronounced in the said court was and is contrary to natural justice, and wholly inoperative and void against him, the said defendant. Verification.

Eighth plea, to the first count, that the said colony of New South Wales in the said first count mentioned is the same colony mentioned and referred to in the 9 Geo. 4, c. 83. And that the said act in the first count mentioned is repugnant to the laws of England, and that at the time of making and passing the same the said governor and

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council had no right, power, privilege, or authority to make, enact, or pass the said last-mentioned act. Verification.

Tenth plea, to the first count, that by the course and practice of the said supreme court of New South Wales, and by the law of the said colony, no member of the said company, except the chairman thereof, could be or become liable or could be called upon to pay or satisfy any debt or damages for and in respect of which judgment should or might be recovered in the said court in any action or suit brought against the chairman of the said company, as the nominal defendant on behalf of the said company, under and by virtue of the said act of the said governor and legislative council, until a writ of *sci. fa.* were first issued upon such judgment, requiring such member to show if he should have or know any thing to say for himself why the plaintiff in such action should not have execution against him for the amount of the debt or damages so recovered, and judgment was thereupon given by the consideration of the said court for the plaintiff in such action that he should have execution against such member for the said debt or damages. That no such writ of *sci. fa.* hath ever been issued against the defendant upon the said judgment of the said supreme court in the said first count mentioned, requiring the defendant to show why the plaintiffs should not have execution against him of the said damages and costs thereby recovered, nor hath any judgment ever been pronounced or given by the said supreme court against the defendant that the plaintiffs should have execution of the said last-mentioned damages and costs against the defendant.

Twelfth plea, to the first count, that the said promises in the first count alleged to have been made by the said company of the Bank of Australia, and in respect whereof the said judgment was obtained, were obtained and procured by the fraud and covin of the plaintiffs and others in collusion with them. Verification.

Fifteenth plea, to the first count, that the said judgment in the first count mentioned, and the record and entry of the said judgment, were and are erroneous according to the law of the said colony of New South Wales. And the said judgment was erroneously and wrongfully and in violation of the said law of New South Wales given for the plaintiffs, and that the said judgment ought, according to the law of New South Wales, to have been given for the said T. C. Breillat as such nominal defendant, as in the said first count mentioned. Verification.

Seventeenth plea, to the second count, that the plaintiffs at the time of the making of the said note, and thence hitherto, have been, and still are, a foreign corporation existing and being, and carrying on trade and business in the said colony of New South Wales, to wit, at Sydney, in the said colony, and within the jurisdiction of the supreme court of the said colony, and that the said note in the second count mentioned was made in the said colony, and within the limits and territory subject to the laws and statutes enacted and passed by the governor and legislative council of the said colony, to wit, at Sydney aforesaid, and that the same was made by, and the said causes of action thereupon accrued against a certain copartnership existing and

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being and carrying on trade and business in and at Sydney aforesaid, called the Bank of Australia, of which said copartnership at the time of the accruing of the said last-mentioned causes of action the defendant was a member, and that the said causes of action accrued against the defendant as such member, and not otherwise. That before the time of the making of the said note, &c., a certain act of the governor and legislative council of New South Wales was made and passed relating to and concerning the said copartnership, to wit, the said act particularly mentioned and set forth in the first count of the declaration, and that the said act still is, and remains in full force and not abrogated or repealed, and at the time of the accruing of the said cause of action and of the commencement of this suit was and continued to be, and still is, the law of the said colony of New South Wales. And that before the time of the commencement of this suit, one T. C. Breillat had been duly elected chairman of the said company, and that a memorial of the name of the said chairman, in the form and to the effect for that purpose set forth in the schedule to the last-mentioned act annexed, signed by the said chairman and a majority of the directors of the said bank, was duly recorded upon oath in the said supreme court of New South Wales aforesaid, within thirty days next after the election of the said chairman, pursuant to the said last-mentioned act. And that the said T. C. Breillat accordingly then and at the time of the commencement of this suit was and continued to be and still is such chairman as aforesaid, and domiciled and living and resident in the said colony of New South Wales, and within the jurisdiction of the said supreme court, to wit, at Sydney aforesaid, and liable to be sued as such chairman as aforesaid upon and in respect of the said last-mentioned causes of action. Verification.

Last plea, to the second, third, and fourth counts of the declaration, that the promises and causes of action in those counts mentioned were made by, and arose against him, the defendant, as a member of the said company in the first count mentioned, and jointly with the other members thereof, and not otherwise, and the same were and are the same identical causes of action for and in respect whereof the said plaintiffs obtained and recovered the said judgment in the first count mentioned as therein alleged; and that the same promises were made and the same causes of action arose within the said colony of New South Wales and within the jurisdiction of the said supreme court of New South Wales aforesaid, and not otherwise; and that by the law of the same colony the same causes of action and all remedies for the same became and were by the recovery of the said judgment in the first count mentioned, before and at the time of the commencement of this suit, and still are merged in the same judgment and extinguished thereby. Verification.

General demurrer to the third, sixth, eighth, twelfth, seventeenth and last pleas.

Replication to the tenth plea, that the defendant was not at the time when the said judgment was so recovered as in the said first count mentioned, nor hath he been at any time since, within the said colony of New South Wales or any of its dependencies, nor had he, the

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defendant, at the time when the said judgment was so recovered against the said chairman of the said company, nor at any time since, any land, goods, or chattels of him, the defendant, within the said colony or any of its dependencies; and that on the occasion of the promises in the said plea aforesaid, there could not be at any time hitherto any good, sufficient, or valid service or execution of any such writ of *sci. fa.* against the defendant, as in the said tenth plea mentioned, according to the law of the said colony in that behalf, nor could any such writ of *sci. fa.* as in the said tenth plea mentioned at any time hitherto have been in any wise made available for having execution against the defendant of the said judgment or of the damages and cost thereby recovered, according to the said law of the said colony in that behalf. Verification.

Special demurrer to the fifteenth plea, on the grounds that, assuming it to be competent to the defendant to allege error in the judgment in the first count mentioned, the defendant ought in his said fifteenth plea to have stated in what such error consists, and to have set out the law of the said colony, so far as applicable to the said judgment, and to have shown in what respects the said judgment was erroneous according to the law of the said colony; and that the said plea wanted certainty in the matters and respects above mentioned, and was in other respects uncertain, informal, and insufficient.

Demurrer to the replication to the tenth plea on the grounds that, although it is stated in the said replication that the defendant was not at the time of the recovery of the said judgment within the said colony, and that he hath not been within the same at any time since, and that he had not then or at any time since any lands, &c., within the said colony or any of its dependencies, yet that the plaintiffs have not in the replication aforesaid stated or shown that the promises therein assigned and set forth were, or are, or could be, or how they could be any good, valid, or sufficient excuse by the law of the colony aforesaid for the said omission of the plaintiffs to sue out the said writ of *sci. fa.* in the tenth plea mentioned, or that in the case and under the circumstances stated and set forth in the said replication of the absence of the defendant from the said colony and of his having no lands, &c., there, the said judgment would, by the law of the said colony, be of any force or effect as against the defendant, or that the defendant was or would be in such case in any way liable thereupon without and until the issuing and execution of the said writ of *sci. fa.*; and that the said replication does not show any matter, either in denial or in confession and avoidance of the matters of defence to the action in the said tenth plea mentioned and specified.

Joinders in demurrer.

Channell, Serj., for the plaintiffs, referred to *The Bank of Australasia v. Harding*; *Henderson v. Henderson*, 6 Q. B. Rep. 288; s. c. 13 Law J. Rep. (N. S.) Q. B. 274; *Ferguson v. Mahon*, 11 Ad. & E. 179; s. c. 9 Law J. Rep. (N. S.) Q. B. 146; *Vallee v. Dumergue*, 4 Exch. Rep. 290; s. c. 18 Law J. Rep. (N. S.) Exch. 398; *Cowan v.*

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Braidwood, 2 Sc. N. R. 138; s. c. 10 Law J. Rep. (N. S.) C. P. 42; *Reynolds v. Fenton*, 3 Com. B. Rep. 187; s. c. 16 Law J. Rep. (N. S.) C. P. 15; when the court desired to hear the objections raised by the defendant, and accordingly called upon

Bovill, for the defendant. The first count of the declaration cannot be supported. This being a law of the colonial legislature, can give no jurisdiction against any others besides persons actually present or having property in the colony. Neither of these facts appear to have existed with regard to the defendant. In Story's Conflict of Laws, s. 539, it is stated that jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory or upon the thing being within the territory. "No sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals." *Buchanan v. Rucker*, 9 East, 192; s. c. 1 Camp. 63.

[*Lord Campbell*, C. J. The question is, whether the defendant, being a shareholder in this company, was not virtually present in the colony.]

Service on one partner abroad cannot be equivalent to service on another partner here, so as to affect the rights of the latter.

Secondly, the local act of the colonial legislature only regulates the mode of proceeding against persons resident within the colony, and has no extra-territorial effect. It creates a right unknown to the common law of suing the chairman of the company as a nominal defendant; but there is no clause making any others except the members for the time being personally responsible in such a suit. It is different from the Banking Act, 7 Geo. 4, c. 46, which prescribes consequences resulting from a suit against the public officer, and a mode of enforcing execution against other classes of shareholders besides those for the time being.

[*Lord Campbell*, C. J. Surely it must have been intended that the judgment against the chairman should be available against all the members individually.]

There is no such provision. All that is enacted is, that execution on the judgment may issue against the property of any of the members for the time being, and that remedy must be confined to the property of members in the colony. This being a new right and a new remedy prescribed by the statute, it must be strictly pursued. *Stevens v. Evans*, 2 Burr. 1152. In *The Dundalk Western Railway Company v. Tapster*, 1 Q. B. Rep. 667; s. c. 10 Law J. Rep. (N. S.) Q. B. 186, a statute prescribed that an action for calls should be brought into the courts in Dublin and not elsewhere, and it was held that this prevented any action being brought here for such a cause.

[*Wightman*, J. That does not show that a judgment obtained in Ireland could not be sued upon here.]

This judgment cannot be enforced against the defendant except under the powers given by the act of the colonial legislature. A

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judgment against a public officer cannot be enforced against a shareholder by action, but only by *sci. fa.* *Cross v. Law*, 6 Mee. & W. 217; s. c. 9 Law J. Rep. (n. s.) Exch. 193.

[*Lord Campbell*, C. J. Is not the judgment evidence of a debt existing between the company and the present defendant?]

It is contended that it is not. No action could be maintained on the judgment against the present defendant, even in the colony, because he was never served with any process.

[*Coleridge*, J. Suppose the only provision were that the chairman might be sued, could not the judgment have been made available against the members?]

Possibly some mode of doing so would then be devised; but here a specific mode of enforcing it by execution against the property of members in the colony is given. Possibly, the individual shareholders might have been sued; but if a plaintiff chooses to adopt the statutory kind of remedy, he must pursue it strictly. *Beech v. Eyre*, 5 Man. & G. 415; s. c. 12 Law J. Rep. (n. s.) C. P. 140. *Blewett v. Gordon*, 1 Dowl. P. C. (n. s.) 815; s. c. 11 Law J. Rep. (n. s.) Q. B. 201. *Harrison v. Timmins*, 4 Mee. & W. 510; s. c. 8 Law J. Rep. (n. s.) Exch. 94. *Steward v. Greaves*, 10 Ibid. 711; s. c. 12 Law J. Rep. (n. s.) Exch. 109.

[*Lord Campbell*, C. J. It seems to me that the right of suing the members is expressly prohibited here.]

There is an express provision that nothing in the act is to relieve them from any responsibilities, duties, contracts, or obligations to which they are by law subject.

Thirdly, it is repugnant to the law of England that a party who is out of the colony should be affected by proceedings against another within the colony. The mode pointed out for enforcing the judgment against a member is by a proceeding against his property within the colony. He cannot be made liable beyond that merely because he is a member of the bank.

Then, supposing the judgment to be enforceable at all against the defendant, it is not conclusive. This point arises on the third, twelfth, and fifteenth pleas.

[*Lord Campbell*, C. J. Each of those pleas might have been pleaded to the original action.]

That is so. But it is argued that the rule of conclusiveness does not extend to the judgments of foreign or colonial courts in an action upon which any objection not merely of form is examinable. The implied *assumpsit* raised by the existence of the judgment may be controlled in all cases except where it is a proceeding *in rem*, or where there is exclusive cognizance of the subject of the suit. *Novelli v. Rossi*, 2 B. & Ad. 757; s. c. 9 Law J. Rep. K. B. 307. In *The Bank of Australasia v. Harding*, Wilde, C. J., says, "In all the cases on the effect of a foreign judgment it has been treated only as *prima facie* evidence of the cause of action;" and he refers to *Houlditch v. Donegall*, 8 Bligh, N. S. 381, which overruled *Martin v. Nicolls*, 3 Sim. 458. In *Walker v. Witter*, 1 Dougl. 1, Lord Mansfield says, "Foreign judgments are a ground of action every where, but they are

examinable;" and in a case of *Galbraith v. Neville*, (referred to in the notes to that case,) Buller, J., says, "The doctrine which was laid down in *Sinclair v. Fraser*, 20 How. State Tr. 468, has always been considered as the true line ever since; namely, that the foreign judgment shall be *prima facie* evidence of the debt, and conclusive till it be impeached by the other party."

[*Lord Campbell*, C. J. It would be a very inconvenient doctrine to allow a judgment affirmed on appeal by the privy council to be reopened in this court.]

On the other hand, it would be a great hardship in the case of a judgment by a foreign court from which there is no appeal if it is to be taken as absolutely conclusive. It is admitted on this record, that the judgment is without foundation, as there was no contract.

[*Lord Campbell*, C. J. Facts are only admitted by a demurrer so far as they are a good defence.]

In *Messin v. Lord Massareene*, 4 Term Rep. 493, Buller J., says, "Though debt will lie here on a foreign judgment, the defendant may go into the consideration of it." In *Phillips v. Hunter*, 2 H. Black. 402, Eyre, C. J., thus lays down the rule: "It is in one way only that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent to which by our law sentences and judgments are obligatory, not as conclusive, but as matter *in pais*, as consideration *prima facie* sufficient to raise a promise." According to this doctrine, such a judgment cannot be conclusive except where a party sets it up by way of defence as *res judicata*. Wherever the party setting it up is seeking to enforce it, the consideration may be disputed. 3 Burge on Colonial Law, 1050. *Donner v. Lipman*, 5 Cl. & F. 1. Story's Conflict of Laws, sect. 63, *et seq.*, treats this question as unsettled.

[*Lord Campbell*, C. J. Mr. Smith, in his note to the *Duchess of Kingston's Case*, 2 Smith's Lead. Cases, 449, is rather against your argument.]

If the pleas in this action must be confined to those matters which could not have been pleaded to the original action, there will then be no difference in point of conclusiveness between English and foreign judgments. In *Henderson v. Henderson*, the defences set up went merely to the mode of proceeding and not to the substance of the action, and in *Ferguson v. Mahon* the point was not raised. In *Smith v. Nicholls*, 5 Bing. N. C. 208; s. c. 8 Law J. Rep. (N. S.) C. P. 92, a plea that a judgment against a public officer was obtained by fraud has been allowed in a *sci. fa.* against a shareholder. But if the plaintiffs set up this judgment as final and conclusive, they should have averred it to be so in the declaration. The court cannot take judicial notice of the law of the colony, by which it is conclusive, if it be so at all. *Plummer v. Woodburne*, 4 B. & C. 625; s. c. 4 Law J. Rep. K. B. 6.

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[*Coleridge, J.* There the judgment was pleaded in bar to an action.]

There is no difference in this respect between a declaration and a plea. Lastly, as to the pleas to the second count, which is on the original cause of action. The seventeenth plea cannot be supported if the previous argument of the defendant be well founded; but if that be not so, it answers the second count by showing that the chairman should have been sued. The twenty-third plea sets up the judgment recovered against the chairman as a merger of the causes of action upon which that judgment was founded. This question, though it was differently raised, was decided by the Common Pleas in *The Bank of Australasia v. Harding*, but none of the authorities were there cited, and it was not much argued in that court. Even if the argument of the defendant as to the first count is correct, it is contended that the judgment being a merger of the debt as to those partners resident in the colony, is an answer as to those also who are non-resident. A judgment against one of several co-contractors prevents an action for the same cause against any of the others. *King v. Hoare*, 13 Mee. & W. 494; s. c. 14 Law J. Rep. (N. S.) Exch. 29.

[*Lord Campbell, C. J.* It only extinguishes the debt against those members who might have been sued for the original cause of action; that is, against those who were resident in the colony.]

Still, having been once recovered upon, no fresh action can be brought for the same cause. If the defendant is wrong in his argument on the first count, this plea is clearly good.

Channell, Serj., in reply. *Henley v. Soper*, 8 B. & C. 16; s. c. 6 Law J. Rep. K. B. 210, and *Henderson v. Henderson*, decide that a foreign decree is evidence of a debt due to the person who seeks to enforce the equity here. No doubt the judgment is not absolutely conclusive; but the only objections which can be raised to it are, either that there was no jurisdiction, or that it was obtained by fraud; the consideration upon which it was founded cannot be inquired into. *Ricardo v. Garcias*, 12 Cl. & F. 368, is the last case on the subject. The other points are disposed of by the judgment of the Court of Common Pleas.

Cur. adv. vult.

The judgment of the court was now delivered by

LORD CAMPBELL, C. J. The first question which we are called upon to decide in this case is upon the validity of the first count of the declaration; and this mainly depends upon whether the defendant is bound by the act of the legislature of New South Wales, which the plaintiffs have set forth. If he be not, the judgment obtained against the Bank of Australia imposes no liability upon him. The act was passed for the benefit of the Bank of Australia, established within the colony, and he was a shareholder in the bank when the act passed and when the promises were made by the bank on which the action against the chairman was commenced. The colonial legislature, we think, clearly had authority to pass an act regu-

lating the procedure by which the contracts of the bank should be enforced in the courts of the colony. Nor is there any thing at all repugnant to the law of England or to the principles of natural justice in enacting that actions on such contracts, instead of being brought individually against all the shareholders in the company, should be brought against the chairman whom they have appointed to represent them. A judgment recovered in such an action, we think, has the same effect beyond the territory of the colony which it would have had if the defendant had been personally served with process, and being a party to the record the recovery had been personally against him. The act imposes no new liability upon him, but only regulates the mode in which that liability shall be judicially constituted. Any specific remedy upon the judgment which might have existed in the colony cannot be obtained out of the colony, and unless the judgment may be made the foundation of an action, it could not in any manner be rendered available in this country. In recompense for the advantages conferred upon the company by the act, it anxiously provides that the rights of the creditors of the company shall not be prejudiced by it. These observations dispose of the pleas that the defendant was not served with process in the original action, and that the act of the colonial legislature is void.

But a most important and difficult question remains upon the third and twelfth pleas to the first count of the declaration, "that the promises upon which the original action was brought were not made by the company, and that the promises were obtained by the fraud and covin of the plaintiffs." There certainly are many *dicta* to be found in the books to support these pleas, for it has often been said, and by judges and juridical writers of great eminence, that the judgment of a colonial court of the British empire comes within the category of a foreign judgment, and that a foreign judgment is only *prima facie* evidence of a debt, being examinable in the courts of this country. It does not appear, however, that the question has ever been solemnly decided, whether in an action on a foreign judgment the merits of the case upon which the foreign court has regularly adjudicated between the parties may again be put in issue and re-tried. Doubtless it is open to the defendant to show that the foreign court had not jurisdiction of the subject matter of the suit, or that he never was summoned to answer, and had no opportunity of making his defence, or that the judgment was fraudulently obtained. Perhaps it was in contemplation of these modes in which a foreign judgment may be impeached, that it has sometimes been said to be only *prima facie* evidence. All the authorities upon the subject are collected and very ably commented upon by Professor Story in his Conflict of Laws, and by Mr. Smith in his notes to Leading Cases. Having attentively examined them, we have come to the conclusion that these pleas are bad. We do not think that there would be any advantage in going over the authorities *seriatim*, attempting either to reconcile them or to contrast them. It may be enough to say that the *dicta* against re-trying the cause are quite as strong as those in favor of this proceeding; and being left without any express decision,

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now that the question must be expressly decided, we must look to principle and expediency. The pleas demurred to might have been pleaded, and if there be any foundation for them, they ought to have been pleaded in the original action. They must now be taken to have been in due manner decided against the defendant. How far it would be permitted to a defendant to impeach the competency or the integrity of a foreign court from which there was no appeal, it is unnecessary here to inquire; for no imputation is cast upon the court by which this judgment was pronounced, and we are bound to take judicial notice that by the law and constitution of this empire there is an appeal from it to her majesty, who would refer the appeal to the judicial committee of her privy council. I will not take notice of the fact of their having been an appeal; but I may say that either there has or there has not been an appeal, and in either case it seems contrary to principle and expediency to suffer the same questions to be again submitted to a jury in this country. A regular mode having been provided by which an erroneous judgment of a colonial court may be examined and reversed, that mode ought to be pursued. Before the judicial committee, the judges there presiding would fairly examine the judgment, and only set it aside if it was unjust. But although perfectly regular and just, it may be set aside if the same questions are again to be submitted to a jury. Although the *onus probandi* is now to be shifted to the defendant, he is to be at liberty to adduce new witnesses whom he may suborn to prove that the company never made the promises which were the foundation of the judgment, or that these promises were obtained by the fraud and covin of the plaintiffs. The documents by which the original cause of action was established in a distant quarter of the globe may be lost or not forthcoming, and the witnesses who truly swore to it may be dead or absent. The defendant may have failed in an appeal to the judicial committee, or may be conscious that there is no ground for it; and if he has this opportunity of again contesting his liability, he may, from the loss of evidence by the plaintiffs, or from a temptation to bring forward false evidence himself, unconscientiously resist the payment of a just demand which had been solemnly adjudicated upon by a competent tribunal. No hardship whatever is cast upon him by requiring him to follow the course to obtain redress against an unjust or erroneous judgment which the law has provided for him. Is it to be said that the peril to the plaintiffs may be obviated, by establishing a rule that the cause shall be re-tried upon the very evidence given in the court below, the inquiry acting as a court of appeal? But there is no authority for this limitation of the inquiry; and these pleas must lead to a new trial, not to an appeal upon the merits of the judgment which has been pronounced. If it were to be merely an appeal, how is the same evidence again to be laid before the jury? and how are the incidental questions of law which must arise to be disposed of? If the judgment was given by a court in a foreign country, or in a court of one of our colonies governed by foreign law, how is the cause to be re-tried at *nisi prius*? In the absence of direct authority, it gives us great satisfaction to think that

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Lord Denman seems to have taken the same view of the subject in *Ferguson v. Mahon*, and still more distinctly in *Henderson v. Henderson*, where he intimates a clear opinion that a plea to an action on the judgment of a colonial court ought to steer clear of an inquiry into the merits of the case; "for whatever constituted a defence in that court ought to have been pleaded there." Upon the demurrer to these pleas, therefore, we give judgment for the plaintiffs.

As to the pleas to the other counts of the declaration, they are substantially the same with those pleaded and overruled in the Court of Common Pleas in the case of *The Bank of Australasia v. Harding*, and we entirely concur in the decision of that court with respect to them.

Judgment for the plaintiffs.

LAWRENCE v. THE GREAT NORTHERN RAILWAY COMPANY.¹

Hilary Vacation, February 22, 1851.

Railway — Compensation — Contingent Damage — Injury to Land — Flood Waters — Mandamus — Action.

A railway company being about to construct their line over certain land of W. C., it was, by agreement, referred to an arbitrator to fix the amount of money to be paid by the company to W. C. as the price of the land to be purchased, as well as for the injury done to his remaining estate by severance or otherwise, and to determine what bridges, arches, culverts, &c., should be made. The arbitrator awarded 7900*l.* as the amount of compensation, and directed what works should be constructed. The money was paid to W. C., and the works directed were done:—

Held, that this sum covered all damage known or contingent by reason of the construction of the railway on the lands purchased, and all other damage arising from the construction of the railway at other places, which was apparent and capable of being ascertained and estimated when the compensation was awarded; but that it did not include any contingent and possible damage which might arise afterwards by the works of the company at other places which could not have been foreseen by the arbitrator.

A railway was constructed across certain low lands adjoining the River D., over which the flood waters of that river used to spread themselves. These low lands were separated from the plaintiff's lands by a bank, constructed under certain drainage acts, which protected the plaintiff's lands from floods. By the construction of the railway without sufficient openings the flood waters could not spread themselves as formerly, but were penned up and flowed over the bank upon the plaintiff's lands. There was no express clause in their act obliging the railway company to make openings for flood waters in that district, but there was a general provision that they should make openings when the railway crossed any public drains, embankments, or works in any drainage district:—

Held, that although they might not be compellable by *mandamus* to make openings for the flood waters in that district, yet that an action would lie against the company for the injury to the plaintiff's lands.

CASE. The first count charged the defendants with erecting an embankment across certain low lands, called Bentley Ings, without leaving sufficient arches or waterway to allow the flood waters of the River Dun to escape as they had been accustomed, by means of which divers quantities of flood water became accumulated on the said low lands, and were forced upon the land of the plaintiff.

¹ 20 Law J. Rep. (n. s.) Q. B. 293.

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The second count was in a similar form, except that it charged the defendants with breaking down a portion of a certain bank, called the Bentley Flood Bank, whereby the flood waters, which were accumulated by means of the defendants' embankment, flowed upon the plaintiff's land.

Pleas, amongst others, that the said embankment was part of the railway formed by the defendants under their acts of Parliament, and was made properly and sufficiently according to the provisions of the same acts, *absque hoc*, that the defendants erected the embankment without leaving sufficient arches or waterway in the declaration alleged.¹

Further plea to the first count, that the said embankment was part of the railway made by the defendants under their acts of Parliament; that the plaintiff was the owner and occupier of the closes in the first count mentioned, which lay near the said part of the railway, and during the whole time of the construction of the railway had full knowledge and notice thereof. That the said part of the railway was carried over the said low lands, called Bentley Ings, with divers arches, tunnels, &c., and other passages for water, for the purpose of conveying the water as clearly from the said closes of the plaintiff as might be; and that the said arches, &c., were of such numbers and dimensions as were sufficient to convey the water from the said closes of the plaintiff as clearly as might be, and were made from time to time as the said railway works proceeded. That the plaintiff never gave notice to the defendants that he considered such arches, &c., insufficient for the commodious use of the said closes, or that the same were insufficient to convey the water as clearly from his said closes as before the making of the said railway, nor did he request the defendants to be allowed to make any further works for the purposes aforesaid.

Further plea to the first count, that before the committing the grievances in that count mentioned, and before the plaintiff was possessed of the said closes, Sir W. B. Cooke was entitled to the said closes in the said count mentioned, as owner thereof in fee simple in reversion

¹ The act 9 & 10 Vict. c. 71, s. 162 enacts, "And in order to preserve a free passage for the flood waters of the said respective districts of drainage [including the Dun district] through all existing drains crossed by the railway and branches, be it enacted, that the company shall and they are hereby required, in carrying the railway over or across the said several and respective districts of drainage, to leave and make arches or openings in or under the said railway, and openings through the embankments thereof in all places where the said railway shall cross any public drains, embankments, or works made in such respective drainage districts, any or either of them, under the powers of the said recited drainage acts, and such arches and openings shall be left and made of not less area than the area of the waterway of the respective drains, embankments, and works so made, when such drains, &c., are charged with water to the highest flood level," &c.

Sect. 163 provides "That the company shall also make and leave arches or openings under and openings through the embankments of such part of the railway as shall be carried across or over the low lands and grounds in the township of Scaftworth, [in the county of Nottingham,] between the River Idle and the Everton drainage barrier banks, in such number as shall be sufficient for the free passage as heretofore of the flood waters of the said river over such lands and grounds, and such arches and openings shall be made and left of not less height than the present height of the said bank, and of such width or capacity as shall be sufficient for the purpose aforesaid."

expectant on the determination of a lease thereof to one J. Mann, and that the defendants constructed the said embankment by the leave and license of the said Sir W. B. Cooke and J. Mann, so being such lessee, given whilst he was in occupation of the said closes, and that the plaintiff became tenant of the said closes with notice of the premises.

Further plea to the first count, that before the plaintiff was possessed of the said closes, in the first count mentioned, and after the passing of their act, the defendants gave notice to Sir W. B. Cooke, who was then interested in the said close in reversion expectant on the determination of the lease to the said J. Mann, requiring to take and use for the purposes of the said railway certain land of his adjoining the said closes of the plaintiff, and that, while Sir W. B. Cooke was owner of the said closes, and before the plaintiff was possessed thereof, to wit, on, &c., an agreement was made between Sir W. B. Cooke and the defendants, whereby the defendants agreed to purchase of Sir W. B. Cooke the said before-mentioned land, and by the said agreement one E. W. W. was appointed arbitrator to settle the amount of money to be paid by the defendants to Sir W. B. Cooke as the price of the land so agreed to be purchased, as well as the amount to be paid by the defendants for injury and damage done to the remaining estate of the said vendor by severance or otherwise, and for compensation for all bridges, arches, tunnels, roads, &c., under, over, across, or alongside of the said railway, except such as should be awarded as thereafter mentioned. [Averment of mutual promises.] That before the plaintiff became possessed, &c., the said E. W. W. made his award, whereby he ordered that 7900*l.* was the price to be paid to Sir W. B. Cooke by the defendants for the purchase of the land in the said agreement mentioned, which sum the said E. W. W. adjudged should be taken to include compensation for all injury and damage to the estate of the said Sir W. B. Cooke by severance or otherwise. That part of the damage included in the said award was all damage and injury done or which might thereafter be done to the estate of the said Sir W. B. Cooke of and in the closes of land in the first count mentioned, by severance or otherwise, by reason of the construction of the railway. That the defendants afterwards, and before the plaintiff became possessed, &c., constructed their railway over the Bentley Ings, (being part of the land included in the said agreement and award,) with arches, drains, culverts, &c., over, under, across, and alongside the said railway, of the number, in the situations, of the dimensions and capacity, and in such manner in all respects as the same were laid down and described in the plan in the award mentioned; and that the liability to all future and contingent damage to the said closes in the first count mentioned, by reason of the said embankment, was included in the said award. [Averment, that the defendants performed the award, and paid to Sir W. B. Cooke, who then took and received of the defendants the said sum of 7900*l.* in performance of the said agreement and award.]

Issue having been taken on these pleas, the cause came on for trial, before Wightman, J., at the York Summer assizes, 1850, when

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it appeared that the plaintiff was, in 1849, the tenant of the closes mentioned in the declaration under Sir W. B. Cooke. The River Dun flows through a tract of low country, which, prior to 1839, was liable to be flooded to the extent of about 8000 acres. In that year, under the provisions of a local drainage act, certain commissioners erected a bank, called the Bentley Flood Bank, stretching in a direction nearly parallel with the river, which confined the flood waters to the land lying between the bank and the river, called the Bentley Ings, along which it flowed for a distance of three or four miles, and then fell again into the river. In 1846, the defendants constructed their railway, and in the course of constructing it, carried an embankment about two feet higher than the Bentley Flood Bank, across the Bentley Ings, in such a manner as to obstruct the course of the flood water and to force it up against the Bentley Flood Bank, there being only one culvert, four feet wide, made for the passage of the water beneath the railway embankment. In 1849, on the occasion of a flood, which, being penned in between the railway embankment and the Bentley Flood Bank, threatened to destroy the railway, the defendants cut down a portion of the Bentley Flood Bank, and thereby let the water into plaintiff's land, which lay behind it. It also appeared that in August, 1847, when one J. Mann was tenant under Sir W. B. Cooke of the land now occupied by the plaintiff, an agreement was entered into between Sir W. B. Cooke, who was the owner of other land through which the railway passed, and the company, by which it was provided that certain land mentioned in the schedule (not including any of that occupied by the plaintiff) should be sold to the company, and that compensation should be paid for all injury and damage to the remaining estate of the said vendor, by severance or otherwise, and an arbitrator was appointed to settle such compensation. The arbitrator awarded as follows: "I order and adjudge that 7900*l.* be the price to be paid to the said Sir W. B. Cooke by the said Great Northern Railway Company, for the purchase of the land and premises so mentioned in the said schedule, the amount being 29 acres; which I adjudge shall be taken to include compensation for all injury and damage to the estate of the said Sir W. B. Cooke, by severance or otherwise." The sum so awarded was paid by the defendants to Sir W. B. Cooke. It was objected, for the defendants, that the sum so awarded and paid must be taken to include all contingent future damage caused by the construction of the railway to land of Sir W. B. Cooke, and therefore to cover the injury sustained by flooding of the plaintiff's land. The learned judge reserved leave to the defendants to move to enter a verdict for the defendants on the first count, if the court should be of that opinion; and the plaintiff had a verdict for 70*l.* on the first count, and 10*l.* on the second count.

A rule *nisi* having been afterwards obtained, —

Hugh Hill and Farrar showed cause,¹ (February 7,) and referred to *Skerratt v. The North Staffordshire Railway Company*, 5 Rail. Cas. 166.

¹ Before PATTESON, WIGHTMAN, and ERLE, JJ.

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Knowles, Watson, and Hall, in support of the rule, referred to sects. 161 and 163 of the special act, (9 & 10 Vict. c. 71;) and to *The King v. The Leeds and Selby Railway Company*, 3 Ad. & E. 683; *Dunn v. Murray*, 9 B. & C. 780; s. c. 7 Law J. Rep. K. B. 320; and *Hodsoll v. Stallebrass*, 11 Ad. & E. 301; s. c. 9 Law J. Rep. (N. s.) Q. B. 132.

Cur. adv. vult.

The judgment of the court was now delivered by

PATTESON, J. The plaintiff is lessee of certain lands under Sir William Bryan Cooke, and he brings this action for an injury to his land by its being flooded, as he alleges, by the fault of the defendants, in constructing their railway across the lands of other persons, without leaving sufficient openings for the passage of flood waters, whereby they were obstructed and penned up and forced upon the lands of the plaintiff. The defendants plead that before the plaintiff had any thing in the lands now in his occupation, they gave notice to Sir W. Cooke to purchase certain lands of his adjoining to those now of the plaintiff; that it was referred to an arbitrator to fix the amount of purchase money and of compensation for injury to the lands and other estates of Sir W. Cooke, by severance or otherwise, and to determine what bridges, arches, culverts, &c., should be made; that he awarded 7900*l.*, and directed what should be constructed; that the money was paid, and the works directed were done. The main point in the case is, whether that compensation relates only to all damage known or contingent by reason of the construction of the railway on the lands purchased of Sir W. Cooke, and to other damage arising from the construction of the railway at other places, which was apparent and capable of being ascertained and estimated at the time when the compensation was awarded, or whether it embraces also all contingent and possible damages which might arise afterwards by the works of the company at other places, and which could neither be foreseen nor even guessed at by the arbitrator. The proposition that it was to be taken to embrace such damages is so startling that we should expect some express provision to be pointed out to that effect, either in the general acts relating to railways, or in the special act under which this railway was constructed, or the instrument of reference. We have examined all these, and are not only unable to find any such express provision, but any clause whatever which can fairly have any such interpretation put upon it. We are, therefore, clearly of opinion that the compensation must be taken in the restricted sense contended for by the plaintiff.

But it is contended, by the defendants, that they have constructed their railway according to the provisions of their special act, the 9 & 10 Vict. c. 71, and are not liable for any consequences which may follow to the damage of the plaintiff. The railway passes across the low lands adjoining the River Dun, over which the flood waters of that river used to spread themselves. Those low lands were separated from the plaintiff's land by a bank constructed under certain drainage acts, and which protected the plaintiff's lands from floods. By the

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construction of the defendant's railway without sufficient openings, these flood waters could not spread themselves as formerly, and were penned up and flowed over the bank on the plaintiff's land. *Prima facie* this would give the plaintiff a cause of action, and the question is, whether the company are protected by their act. Now, the 162d section obliges them to make openings when the railway crosses any public drains, embankments, or works made in any drainage district, but it is silent as to flood waters. The 163d section, indeed, obliges them to make openings for flood waters in another district in another county, and is relied on by the defendants on the principle *expressio unius est exclusio alterius*; and certainly, so far as any remedy by *mandamus* or otherwise to compel them to make openings for flood waters in the Dun district might be attempted to be enforced, the act would not warrant it. The company may have been at liberty, under the act, to construct their railway across the low lands in the manner they have done; but it does not follow that in case an unforeseen injury arises to any one from the mode in which it is constructed they are not liable to an action. It was, indeed, held in *The King v. Pease*, 4 B. & Ad. 30; s. c. 2 Law J. Rep. (n. s.) M. C. 26, that where an act of Parliament authorized the making of a railway parallel and very near to a highway, the company were not answerable for injuries sustained in consequence of horses passing along the highway being frightened, but there the proximity to the highway being expressly authorized by the act, and the railway being used in the proper and ordinary manner, it was impossible to hold the company responsible without in effect repealing the act of Parliament. Here the company might, by executing their works with proper caution, have avoided the injury which the plaintiff has sustained, and we think that the want of such caution is sufficient to sustain the action. The injury on the second count was expressly found by the jury. The rule to enter a verdict for the defendants must be discharged. *Rule discharged.*

*In re COWGILL, a Bankrupt.*¹

Hilary Term, January 23, 1851.

Bankrupt — 12 & 13 Vict. c. 106, s. 256, 257 — Certificate to found Execution — Concealment of Property — Refusal of Certificate of Conformity — Appeal — Jurisdiction.

When the Court of Bankruptcy has refused to grant a certificate of conformity on the ground that the bankrupt has committed any of the offences enumerated in sect. 256 of stat. 12 & 13 Vict. c. 106, the granting of a certificate to the assignees, or a creditor, upon which a writ of execution may be issued against the body of the bankrupt, in pursuance of sect. 257, is a ministerial act, and being for the purpose of enforcing payment of the bankrupt's debts, it may be granted from time to time upon the application of the assignees or creditors.

This court has no power to inquire into the grounds upon which a certificate of conformity was refused by the Court of Bankruptcy.

¹ 20 Law J. Rep. (n. s.) Q. B. 300. 15 Jur. 509.

In re Cowgill.

THOMAS COWGILL having been adjudged to be a bankrupt on the 15th of October, 1850, the commissioner for the District Court of Bankruptcy at Leeds adjudicated that he had concealed property when he passed his last examination, and upon that ground refused his certificate, or to grant him any further protection. A certificate, in pursuance of sect. 257 of the stat. 12 & 13 Vict. c. 106, in the form contained in schedule B, *a*, was then granted to the assignees, entitling them to issue a writ of execution against the body of the bankrupt; and on the 30th of October the bankrupt was lodged in York Castle under a sheriff's warrant, founded upon a writ of *ca. sa.* issued out of this court upon that certificate. On the 19th of November the bankrupt was discharged by order of the commissioner, on the ground that the express consent of the official assignee to the application for the certificate had not been obtained. On the 7th of December, application was made to the Court of Bankruptcy, on behalf of one Penny, a creditor who had proved his debt, for another certificate, in pursuance of sect. 257, which was granted to him; and on the 14th of December, the bankrupt was again committed to York Castle under a sheriff's warrant, founded upon a writ of *ca. sa.* issued upon the last-mentioned certificate. Upon affidavits stating these facts, —

Atherton now moved for a rule calling upon Penny to show cause why the writ of *ca. sa.*, which had been issued by him, should not be set aside, and the bankrupt discharged out of custody; or why a writ of *habeas corpus* should not issue to the governor of York Castle to bring up the prisoner. The Court of Bankruptcy had no power to grant this certificate. The granting of it depends upon one of two conditions being fulfilled; either that the Court of Bankruptcy should have refused to grant the bankrupt any further protection, or that it should have refused or suspended his certificate. Neither of these conditions have been here complied with. Sect. 256 of the 12 & 13 Vict. c. 106 mentions nine instances of misconduct in which the court may refuse to grant the certificate, and the ground of the refusal in this case is not one of those instances, as the adjudication does not find that the bankrupt concealed his property "with intent to diminish the sum to be divided among his creditors, or to give an undue preference to any of his creditors."

[*Lord Campbell*, C. J. Have we jurisdiction to hear an appeal from the decision of the commissioner?]

This is not an appeal, which can only be where the court appealed from has jurisdiction.

[*Lord Campbell*, C. J. If this is an erroneous exercise of jurisdiction, the remedy is under sect. 259, by application to the Court of Bankruptcy.]

Secondly, the bankrupt having been imprisoned once under process issued in pursuance of sect. 257, cannot be taken again. No second certificate can be issued under that section. This is a new mode of punishing the bankrupt for committing any of the offences enumerated in sect. 256, which should be construed in favor of liberty.

In re Cowgill.

[*Patteson, J.* According to that, if one creditor is paid off, every other creditor is barred of his remedy; the *ca. sa.* is to issue for the precise debt mentioned in the certificate, in the form contained in the schedule.

Lord Campbell, C. J. This is like a commitment under the Insolvent Debtors Act, from which the debtor is discharged as soon as the debt is paid; and if by negligence in the jailer the debtor escapes, he is liable to an action by the creditor.]

By sect. 259, "If any bankrupt shall be taken in execution after the refusal of protection, or after the refusal or suspension of this certificate, he shall not be discharged from such execution until he shall have been in prison for the full period of one year, except by order of the court;" therefore, the commissioner may require that he shall suffer imprisonment for one year, notwithstanding payment of the debt. The proviso at the end of the same section, "that this enactment shall not take effect until after the expiration of six months from the commencement of this act, and then only against such persons as shall have been adjudged bankrupt under this act, or for offences committed after the commencement of this act," shows that the proceeding is *in panam*. Thirdly, the certificate was granted *ex parte* behind the back of the bankrupt. By sect. 256, the refusal or suspension of the certificate of conformity must be at a public meeting, and the application for the certificate, under sect. 297, ought also to be at the same public meeting.

[*Patteson, J.* That depends upon whether the granting of that certificate is a ministerial or a judicial act.]

J. Addison appeared to show cause in the first instance, but was not called upon.

LORD CAMPBELL, C. J. I am of opinion that neither of the points contended for can be maintained. First, the remedy for the bankrupt to pursue, if his certificate is improperly refused, is by appeal, and not by *habeas corpus*, or application to set aside the execution issued against him in consequence. Secondly, it is impossible to say that the power of granting a certificate under sect. 257 to a creditor is limited in the manner contended for, because it may be granted on the application of any creditor. Then, the certificate of conformity being properly refused, as we must assume it was, it is peremptory on the commissioner to grant a certificate to the assignees or a creditor, in pursuance of sect. 257.

PATTESON, J. We cannot, upon this application, enter into the question whether the commissioner rightly refused the bankrupt his certificate or not; the bankrupt was heard upon the occasion, and the whole question was gone into. Then, the bankrupt's certificate of conformity being refused, the other certificate follows as a matter of course; and the issuing of the writ of *capias* is a ministerial act. As to this proceeding being *in panam*, and not for the purpose of enforcing payment, the *ca. sa.* has at least a double aspect. I cannot

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see why the sum due to the creditor should be mentioned in the certificate, unless it be for the purpose of the assignees or the creditor getting the amount of their debt.

COLERIDGE and ERLE, JJ., concurred.

Rule refused.

LATHAM & another v. SPEDDING.¹

Trinity Term, May 29, 1851.

County Court — 9 & 10 Vict. c. 95, s. 58 — 13 & 14 Vict. c. 61, s. 13
— *Costs* — *Title in Question* — *Plea of "Not possessed."*

Where a plaintiff recovers in a superior court a less sum than those mentioned in the 13 & 14 Vict. c. 61, s. 11, in any of the actions there specified, the *onus* of proving that he is entitled to costs under sect. 13 of the same act is cast upon him; and if he claims his costs upon the ground that title was in question, under the 9 & 10 Vict. c. 95, s. 58, he is bound to establish the fact that the title did really *bona fide* come in issue, and not merely that the defendant so pleaded that it might possibly have come in issue.

Where to an action of trespass *quare clausum fregit* the defendant pleaded "not possessed," but no question of title in fact came in question:—

Held, that the jurisdiction of the county court was not ousted.

TRESPASS for breaking and entering the plaintiffs' dwelling-house.

Pleas — Not guilty, by statute; and that the dwelling-house was not the dwelling-house of the plaintiffs.

At the trial, before Lord Campbell, C. J., at the sittings in Middlesex, after Hilary term, 1851, it appeared that the present action was brought for a trespass committed in distraining for rent upon the premises in question, of which the plaintiffs, who were executors, had been in possession for a day and a night. A replevin had been brought in the county court in respect of the distress, and judgment had there been recovered by the plaintiffs against the defendant. At the trial of the present action, no question arose as to the title of the plaintiffs to the house in question. The jury returned a verdict for the plaintiffs, with 40*s.* damages, and the learned judge refused to certify that it was a proper case to be tried in a superior court. Subsequently, an application was made, at chambers, to Patteson, J., to give the plaintiffs their costs under the 13 & 14 Vict. c. 61, s. 13, and that learned judge conceiving that "not possessed" put in issue the title to land and ousted the jurisdiction of the county court, considered that he had no discretion, and made the order accordingly.

A rule *nisi* to rescind that order was afterwards obtained, against which

¹ 20 Law J. Rep. (N. S.) Q. B. 302. 15 Jur. 576.

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Montagu Chambers and *C. W. Wood* showed cause.¹ The order of the learned judge was one which he was bound to make.

[*Patteson, J. Jones v. Harrison*, 20 Law J. Rep. (N. S.) Exch. 166; s. c. 15 Jur. 337; 3 Eng. Rep. 579, decides that I had a discretion; and if I had thought so, I should certainly have exercised it in accordance with the opinion expressed by Lord Campbell at the trial.]

That case does not affect the present, because there a concurrent jurisdiction was given to the superior and county courts. Here the county court had no jurisdiction at all. By the proviso in the 9 & 10 Vict. c. 95, s. 58, the county court has not cognizance of any action "in which the title to any corporeal or incorporeal hereditaments, &c., shall be in question." The 13 & 14 Vict. c. 61, s. 1, extends the jurisdiction of the county court in all actions, except those specified in the proviso to sect. 58 of the former act. Now, *Timothy v. Farmer*, 7 Com. B. Rep. 814, shows conclusively that title was here brought into question by the defendant's plea of "not possessed," and that the jurisdiction of the county court was ousted, so that a plaint could not have been entered there. *Purnell v. Young*, 3 Mee. & W. 288; s. c. 7 Law J. Rep. (N. S.) Exch. 80. *Tinnisswood v. Pattison*, 3 Com. B. Rep. 243; s. c. 15 Law J. Rep. (N. S.) C. P. 231. *Wright v. Cattell*, 19 Law J. Rep. (N. S.) Chanc. 527.

[*Lord Campbell, C. J.* The words are, "in which the title *shall be* in question." Here title was not, in fact, in question.]

The instant that a plea of "not possessed" is put upon the record, the jurisdiction of the county court ceases. According to the judgment in *Purnell v. Young*, that plea is necessarily a denial of title; it is a denial of possession, if the defendant is a wrong-doer, in which case possession is title, and it is a denial of the right to the possession in other cases.

[*Wightman, J.* Before the new rules, title might be in issue under "not guilty." According to your argument, it always must have come in question under that plea.]

That is answered by the observations in *Purnell v. Young*.

[*Lord Campbell, C. J.* Surely a county court can try whether a plaintiff is possessed of a house or not.

Patteson, J. The plea of "not possessed" obliges the plaintiffs to prove a possession, but it enables the defendant to call upon them to prove more. If he does so call upon them, title comes in question.]

The jurisdiction of the county court cannot depend merely upon whether a question of title arises in the course of the inquiry: if the nature of the proceedings is such as to raise an issue upon the title, the jurisdiction of the county court does not arise. If so, the plaintiffs' right to costs depends upon the Statute of Gloucester, as they have recovered 40s.

Lush, in support of the rule. The only question before the court is, whether the plaintiffs have an absolute right to an order for their costs, under the 13 & 14 Vict. c. 61, s. 13. The learned judge sup-

¹ May 12, before LORD CAMPBELL, C. J., PATTESON and WIGHTMAN, JJ.

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posed he had no discretion to refuse the order; but it must be taken that if he had any discretion in the matter, he would have done so. Is this, then, a case in which no plaint could have been entered in a county court? The plaintiffs rely on cases showing that "not possessed" may put the title in issue. *Purnell v. Young* turned upon the 43 Eliz. c. 6, which defined the classes of actions in which a judge might certify to deprive a plaintiff of costs, and in which the words are, actions "not being for any title or interest of lands." The question under the County Courts Act is, whether the title did come in question. That it might have come in question on these pleadings is not denied; but the plaintiffs upon whom the *onus* of proving their right to costs now lies can only succeed by showing affirmatively that it did come into question. But it is plain there was here no question raised as to title, whether founded on possession or otherwise. According to the plaintiffs' argument, every action of trespass *quare clausum fregit*, with a plea of "not possessed," would be *ipso facto* out of the jurisdiction of the county court. But it has been decided that the judge must ascertain as a fact whether title does or does not come in question before him. *Lilley v. Harvey*, 5 Dowl. & L. P. C. 648; s. c. 17 Law J. Rep. (N. S.) Q. B. 357. If this identical evidence had been given in the county court, no prohibition would have been granted.

Cur. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. We are of opinion that this rule must be made absolute. The learned judge made the order for costs to the plaintiffs, considering that the stat. 13 & 14 Vict. c. 61, s. 13, was imperative on him to do so, if the case was one which could not have been brought before the county court, and treating the defendant's plea of "not possessed" as conclusive upon him, that the title did come in question, and therefore that the county court could not have entertained the suit, according to the case of *Timothy v. Farmer*. At the time of the decision of that case, the initiative as to depriving the plaintiff of costs lay on the defendant, by the 9 & 10 Vict. c. 95, s. 129; and it might be that he having pleaded "not possessed" was concluded from asserting that the title did not come in question. But by the last act the *onus* as to costs for the plaintiffs is thrown on the plaintiffs, and we think it clear that they are bound to show that they could not sue in the county court, by establishing the fact that the title did really and *bona fide* come in issue; not merely that the defendant had so pleaded that it possibly might have come in issue. The words of sect. 58 of 9 & 10 Vict. c. 93, are, that the court shall not have cognizance of any action "in which the title to any corporeal or incorporeal hereditaments *shall be in question*." We hold that these words mean, shall really and *bona fide* be in question. Now, the affidavits in this case clearly show that the title was not in question; the plaintiffs therefore might have sued in the county court, nor could the defendant have ousted the jurisdiction of that court by any pretence of disputing the title. The order, therefore, cannot be supported.

Rule absolute.

The Birmingham and Oxford Junction Railway Company v. Regina.

IN THE EXCHEQUER CHAMBER.

THE BIRMINGHAM AND OXFORD JUNCTION RAILWAY COMPANY v.
REGINA.¹

Hilary Vacation, February 1, 1851.

Mandamus — Railway Company — Lands Clauses Consolidation Act — Summoning Jury for Compensation after compulsory Powers expired.

Where within the prescribed period the promoters of a railway company gave notice to a land owner on the intended line of railway, that they required to purchase his lands, and the land owner served them with a notice to treat, and demanded that the amount of compensation should be settled by a jury, and no further steps were taken to complete the purchase until after the expiration of the period prescribed for the exercise of the powers of the company for the compulsory purchase and letting of lands:—

Held, that the company might, on the application of the land owner, notwithstanding the lapse of time, be compelled by *mandamus* to issue their warrant to the sheriff to summon a jury to assess the amount of compensation.

ERROR from the Queen's Bench on a judgment given on a demurrer in favor of the prosecutor of a *mandamus* against the Birmingham and Oxford Junction Railway Company.

The *mandamus* and proceedings are fully set out in the report of the case below. 19 Law J. Rep. (n. s.) Q. B. 453.

Whateley, for the plaintiffs in error, the defendants below, urged the same arguments as in the court below, and contended that the right to the exercise of the powers of the act of Parliament, in summoning a jury to assess compensation to a land owner, could not depend upon the willingness of the land owner to part with his lands; that consequently the powers ceased at the expiration of the time for the exercise of the compulsory powers of the act; and he cited the decision in his favor of the vice chancellor in *Brocklebank v. The Whitehaven Junction Railway Company*, 16 Law J. Rep. (n. s.) Chanc. 471.

Mellor, for the defendant in error, the prosecutor below, repeated the arguments used for the prosecutor in the Court of Queen's Bench, and urged that the summoning of the jury was no part of the exercise of the compulsory powers of the Lands Clauses Consolidation Act, and remarked that Lord Chancellor Cottenham had, on a subsequent occasion, doubted the decision in *Brocklebank v. The Whitehaven Junction Railway Company*.

PARKE, B. We are all of opinion that the judgment given by Lord Chief Justice Campbell, in the court below, is correct, and that the 123d section of the 8 Vict. c. 18, which restricts the company from exercising their powers for the compulsory taking of lands beyond

¹ *Coram* PARKE and ALDERSON, BB., MAULE and CRESSWELL, JJ., PLATT, B., WILLIAMS and TALFOURD, JJ. 20 Law J. Rep. (n. s.) Q. B. 304.

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the prescribed period, is binding upon the company only. The notice to treat is an inchoate purchase, and after that has been given in due time it is competent for the land owner to compel the completion of the purchase. We think that the company in this case are bound to pay for the land, and that the land owner is bound to convey it to them. The judgment of the vice chancellor in the case cited from chancery has, it seems, not met with the concurrence of the lord chancellor.

Judgment affirmed.

REGINA v. THE LORDS OF THE TREASURY; *in re* THE QUEEN DOWAGER'S ANNUITY.¹

Hilary Vacation, February 1, 1851.

Annuity — Apportionment — Queen Dowager — Mandamus — Consolidated Fund — Lords of Treasury.

By the 1 & 2 Will. 4, c. 11, King William the Fourth was empowered, by indenture, to grant to the queen an annuity of 100,000*l.*, to commence from the death of the king, and to be paid out of the consolidated fund. By indenture, dated the 6th of April, 1832, in pursuance of this act, the king granted to trustees in trust for her majesty the annuity of 100,000*l.*, and directed that it should be paid at the receipt of the exchequer, and that the auditor of the exchequer should issue debentures for paying the same, and that the commissioners of the treasury should cause the said sum of 100,000*l.* to be paid out of the consolidated fund. By the 4 & 5 Will. 4, c. 15, the office of auditor of the exchequer is abolished, and in all cases of grants by Parliament charged on the consolidated fund, instead of debentures being issued by the auditor, the commissioners of the treasury are required to issue warrants for the payment of the moneys granted:—

Held, that a *mandamus* would lie to the lords of the treasury to issue such a warrant.

The annuity to the queen was, by the act of Parliament and the indenture granting it, "to commence and take effect immediately after the decease of his majesty, and to continue from thenceforth and during the natural life of her majesty, and to be paid and payable at the four most usual days of payment, viz., the 31st of March, the 30th of June, the 30th of September, and the 31st of December, by even and equal portions, the first payment to be made on such of the said days as should first and next happen after the decease of his majesty." King William the Fourth died on the 25th of June, 1837, and upon the 30th of the same month a full quarter's annuity was paid to the queen dowager. The queen dowager died on the 2d of December, 1849:—

Held, that no apportionment of the quarter's annuity which would have been payable on the 31st of December could be made in her favor:—

Held, also, that the fact of a whole quarter's annuity having been paid on the 30th of June, 1837, would not have prevented a *mandamus* being issued to compel payment of a proportional part of the last quarter, up to the day of her death, if the annuity had been apportionable.

The same act of Parliament and indenture settled upon the queen dowager Marlborough House during her life, and limited an interest therein to her executors for a year after her death, and the indenture (to which the queen was a party) expressed that the annuity was in lieu of dower:—

Held, that these circumstances did not show that the annuity was apportionable.

A RULE nisi had been obtained, calling upon the lords commissioners of her majesty's treasury to show cause why a writ of *man-*

¹ 20 Law J. Rep. (n. s.) Q. B. 305.

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damus should not issue, directed to them, commanding them to issue such warrant and give such directions as by law required for the payment to Henry Lord Brougham and Vaux of the arrears in respect of the amount due subsequently to the 30th of September, and payable on the 31st of December, 1849, of the annuity or yearly sum of 100,000*l.* charged on and payable out of the consolidated fund of the United Kingdom of Great Britain and Ireland, under and by virtue of 1 & 2 Will. 4, c. 11.

The following were the facts upon which this rule was founded: After the accession of King William the Fourth to the throne, the 1 & 2 Will. 4, c. 11, was passed, being an act for enabling his majesty to make provision for supporting the royal dignity of the queen in case she should survive his majesty, by which it was enacted that it should be lawful for the king, by any letters patent or indenture under the great seal thereafter to be made, to give and grant to her said majesty the queen, or to such other person or persons as his majesty should think fit, to be named in such letters patent or indenture, or his or their heirs, to the use of or in trust for her majesty, an annuity or yearly rent or sum of 100,000*l.*, which annuity or yearly sum of 100,000*l.*, and every part thereof, should commence and take effect immediately from and after the decease of his majesty, and continue from thenceforth for and during the natural life of her majesty, and should be paid and payable out of the consolidated fund of the United Kingdom, at the four most usual days of payment in the year, (that is to say,) the 31st of March, the 30th of June, the 30th of September, and the 31st of December, by even and equal portions; the first payment thereof to be made at such of the said days as should first and next happen after the decease of his majesty, in case her majesty the queen should survive him as aforesaid. Sect. 3 of the act enabled the king to grant Marlborough House and the office of keeper of Bushy Park, together with the office of house-keeper of Hampton Court, to or in trust for her majesty during her life, so as an estate or interest be limited to her executors, &c., to take effect immediately after her death, and to continue for one whole year next ensuing. By an indenture under the great seal, dated the 6th of April, 1832, to which Queen Adelaide was a party, it was witnessed that, "our sovereign lord the king being desirous to settle in the most speedy, solemn, and effectual manner a certain ample revenue for supporting the honor and dignity of her majesty in case she should survive his majesty, for her jointure and in full recompense and satisfaction of her dower, by virtue and in pursuance of the said act, gave and granted to William Lord Archbishop of Canterbury, Henry Lord Brougham and Vaux, Charles Earl Grey, William Viscount Melbourne, Rowland Lord Hill, and Charles Manners Sutton, being persons whom his said majesty had thought fit to be named therein as trustees in that behalf, and to their heirs, one annuity or yearly rent or sum of 100,000*l.*; which annuity or yearly sum of 100,000*l.*, and every part thereof, should commence and take effect immediately from and after the decease of his majesty, and continue from thenceforth for and during the natural life of her majesty, and should be paid

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and payable out of the consolidated fund of the United Kingdom, at the four most usual days of payment in the year, (that is to say,) [as in the act;] the first payment thereof to be made on such of the said days as should first and next happen after the decease of his majesty, in case her majesty the queen should survive him as aforesaid. To have, hold, receive, perceive, take, and enjoy the said annuity, &c., from time to time quarterly, at the days aforesaid, as the same shall accrue and become due to the said trustees, their heirs and assigns, immediately from and after the decease of his majesty, for and during the natural life of her majesty, in trust nevertheless for the only benefit and behoof of her majesty, and for her better support. There was a clause directing that the annuity should be paid and payable from time to time at the receipt of the exchequer, and that the auditor of the receipt should issue debentures from time to time for paying, according to the directions of the said act and of the indenture, the said annuity as the same should become payable, and that the commissioners of the treasury and the high treasurer and under treasurer of the exchequer for the time being should cause the said sum of 100,000*l.* to be issued and paid according to the tenor and true meaning of the said act and indenture out of the consolidated fund. And his majesty thereby further willed, directed, authorized, and appointed that her majesty or her said trustees, in case of neglect or refusal of the payment of the said annuity or any part thereof, should have such remedies, aid, and assistance from time to time from the heirs and successors of his majesty, and from their officers for the time being, as should be reasonably desired by her majesty or her said trustees, or any of them, or the heirs of the survivor of such trustees, for the recovery and due payment of the said annuity, and every or any part thereof, and all arrearages of the same which should at any time or times become due or payable according to the tenor and true meaning of the said act and indenture. And, by the same indenture, his majesty also gave, granted, and appointed that Marlborough House, with all its rights, &c., and also the office of keeper and the custody of Bushy Park, together with the office of housekeeper and custody of the capital messuage of Hampton Court, should immediately from and after the decease of his majesty be and remain to the use of the said trustees, and their executors and administrators, during the term of her majesty's natural life, and for the further term of one year, to commence and take effect immediately from and after the decease of her said majesty, upon trust, to permit and suffer her majesty to have, possess, use, and enjoy the said capital messuage, &c., during the term of her natural life, to and for her majesty's sole benefit and behoof, and from and immediately after her said majesty's decease, for the sole benefit and behoof of the executors, administrators, and assigns of her said majesty, until the end of the said year after her majesty's demise. "And, lastly, her majesty is hereby pleased to declare her assent unto and acceptance of the several grants made of the said annuity or yearly sum of 100,000*l.* and of the said capital messuage, &c., and all and singular the premises hereby granted and assured in trust for her majesty for

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such estate and interest as aforesaid, and confirmed by the said act of Parliament, in full recompense and satisfaction and bar of all her dower, and of all her right and title of dower whatsoever."

King William the Fourth died on the 27th of June, 1837, and on the 30th of June, 1837, being the first day of payment next ensuing, payment was made of one quarter of the annuity of 100,000*l.*, and payment thereof was made by even and equal portions on each of the said days of payment up to and inclusive of the 30th of September, 1849, but no payment of the said annuity had been made in respect of any period subsequent to the 30th of September, 1849. On the 2d of December, 1849, the queen dowager died, having previously made her will, appointing executors. Applications had been made by the executors, and also by Lord Brougham, as surviving trustee, to the lords of the treasury, for the payment of a proportionate part of the said annuity in respect of the period of time from the 30th of September to the 30th of January, or to the 2d of December, 1849, but such applications had been refused.

Sir J. Romilly, (attorney general), *Sir A. Cockburn*, (solicitor general,) *M. D. Hill*, and *Welsby*, showed cause.¹ It is not intended to raise any objection to the jurisdiction of the court to interfere by way of *mandamus* in this case.

[*Lord Campbell*, C. J. No such objection could be made, for, by the act of Parliament, until the lords of the treasury have done the act which they are required to do, the claimants cannot take any steps to make their claim good. If this claim be well founded, a *mandamus* is the only proper mode of enforcing it. If it were not so, I do not think the parties, by waiving the objection, could give us jurisdiction to issue the writ.]

Then, the substantial question to be decided is, whether the personal representatives of the late queen dowager are entitled to claim the portion of her annuity which accrued between the last quarterly day of payment and her decease. That will depend on the construction given to the 1 & 2 Will. 4, c. 11, s. 1, the act by which the pension was conferred. Were this a question as to the interpretation of a marriage settlement between persons occupying a private station, no doubt could be entertained as to the disallowance of the claim. Prior to the passing of the 4 & 5 Will. 4, c. 22, it was a settled principle that annuities were not apportionable. *Ex parte Smyth*, 1 Swanst. 349. *Price v. Williams*, Cro. Eliz. 380. *Franks v. Noble*, 12 Ves. 484. *Wilson v. Harman*, 2 Ves. Sen. 672. *Sherrard v. Sherrard*, 3 Atk. 502. Whenever such an apportionment was intended, the invariable practice was to insert a provision to that effect in the instrument by which the annuity was given. To this rule there were only two exceptions produced by the necessity of the case — annuities for the maintenance of infants, or of married women living apart from their husbands. *Hay v. Palmer*, 2 P. Wms. 501. *Howell v.*

¹ January 27, before LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and WIGHTMAN, JJ.

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Hanforth, 2 W. Black. 1016. *Anderson v. Dwyer*, 1 Sch. & Lef. 301. And that such was the doctrine is also further shown by the language employed in the preamble of the 4 & 5 Will. 4, c. 22, which expressly states that annuities could not be apportioned. That may, therefore, be taken as a legislative declaration of what was the existing law and the evil which it was designed to remedy. The provisions of the 2d section of that act may be relied on by the other side as affording the benefit claimed by them; but they refer only to cases where the annuity exists after the determination of the interest of the person entitled for life, and not to those where, as in the present instance, it ceases absolutely with the life of the person in whose favor it was created. Bythewood's Conveyancing, by Jarman, vol. ix. 578. Neither does the 1 & 2 Will. 4, c. 11, s. 1, contain any thing which takes the case out of the ordinary operation of the principle of law. On the contrary, the words used are clearly restrictive, and exclude all presumption that an apportionment was contemplated. Such a presumption has been sought, indeed, to be deduced from the fact, that by the third clause Marlborough House and the rangership of Bushy Park are granted to the executors of the queen dowager for a year after her decease, which, it is said, would, without the annuity, be a useless burden. But this argument, if it proved any thing, would prove too much, since it would go to show that the executors were entitled to the annuity, not only up to the day of her majesty's death, but for a year after that event. If this annuity did accrue *due de die in diem* it will be found, upon a calculation of the dates, that the queen dowager received payment for nineteen days more than she actually survived the king. But, further, the granting a *mandamus* is purely within the discretion of the court. *The King v. Paddington*, 9 B. & C. 486; s. c. 8 Law J. Rep. M. C. 4; and in the exercise of this discretion, and looking at all the circumstances of the case, the court will be of opinion that justice will be best administered by refusing to allow this writ to issue.¹ They also referred to Bythewood's Conveyancing, by Jarman, vol. ix. 247, 248.

Merewether, Serj., *Sir F. Thesiger*, *Peacock*, *John Henderson*, and *Sears*, in support of the rule. There is no principle of law before the statute 4 & 5 Will. 4, c. 22, which imperatively provided that a payment should not be apportionable unless there were express words of apportionment. If the object of the annuity is such as to require that there should be an apportionment, such an apportionment will be made. That is the principle which pervades all the cases on the subject which are collected in 2 Williams on Executors, 710, 4th ed., and which it is not intended to question. The rule as to apportionment of annuities for the maintenance of infants and married women,

¹ The court intimated an opinion, during the attorney general's argument, that the point was of sufficient importance to be discussed upon the record, and, if required, taken to a court of error, and, therefore, offered to make the rule absolute for a *mandamus*, without expressing any opinion upon the question at issue. But both sides agreeing to abide by the decision of the court upon the motion, the case was heard out.

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which is admitted by the other side to exist, is founded solely upon the intention of the parties.

[*Coleridge, J.* This grant differs in one respect from an ordinary gift of an annuity for life, for it is expressly given for the support of her majesty's honor and dignity.]

That affords a strong argument in favor of an apportionment being proper to be made. It is entirely a question of construction and of intention. If the intention of Parliament was to give the queen dowager the annuity during the whole period of her widowhood, there is no principle of law which militates against such a construction. It is, indeed, said that the crown being in this case the grantor, the construction most favorable to the crown must be followed. But this grant purports to be made *ex certa scientia et mero motu*, and is therefore to be taken beneficially for the patentee. *Case of Alton Woods*, 1 Rep. 49, *a*. Grants made under acts of Parliament are to be construed according to the intention; *Dwarris on Stat.* 552; and the general intention in this case was to give an annuity accruing *de die in diem* from the day of the death of King William the Fourth until the day of the death of the queen dowager. The provision for the days upon which it is to be paid is independent of that intention, and does not affect the right to the money which has accrued due. The days fixed are the four most usual days of payment, but there is no limit restricting them to the period of the queen's life. *Hay v. Palmer*, 2 P. Wms. 501. According to the construction of the other side, this anomaly might occur. The king might have died on the 1st of July, and the queen dowager might have died on the 29th of September following, in which case, although she had lived only two days short of a quarter, she would receive nothing. Such was clearly not the intention. But it is said that the payment of 25,000*l.* having been made on the first quarter day in respect of ten days only, shows that no apportionment can take place at the end of the time. That payment, however, was made in express pursuance of the terms of the statute, and according to the argument on the other side it would not have been competent to the king, even by an express stipulation, to make the annuity apportionable as to the last payment. But he clearly might have so provided. The argument as to the apparent anomaly of allowing an apportionment at the end, but not at the beginning, is equally applicable to cases within the Apportionment Act, and it was disregarded by the court in *Wighall v. Brown*, 6 Sim. 99. It is said that the preamble to the 4 & 5 Will. 4, c. 22, is a legislative declaration that annuities, &c., due at fixed periods were not apportionable without express provision, and that therefore this annuity is not apportionable. But, in the first place, this annuity is not *due*, but only *payable* at a fixed period; and secondly, such a declaration of the law cannot be conclusive, as it is a mere recital. Per Ashhurst, J., in *Dore v. Gray*, 2 Term Rep. 358. *Russell v. Ledsam*, 14 Mee. & W. 774; s. c. 14 Law J. Rep. (N. S.) Exch. 353. But it is said that this must be likened to the grant of an ordinary jointure, in which there would be no apportionment. No authority for such a proposition has been cited. At all events, such a provision might be made appor-

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tionable either by express words or necessary implication. This annuity is accepted by the queen dowager in lieu of dower, and therefore it will be like a jointure under the 7 Hen. 8, c. 10, which must continue up to the day of the death of the jointress. Co. Litt. 36, b.

[*Wightman*, J., referred to *Clun's Case*, 10 Rep. 127, b.]

That is a case of rent, which differs, because there no personal charge arises until the day upon which it is payable. According to the old law, if the tenant for life died before 12 o'clock in the day on which the rent is payable, it went to the remainder-man. The clause of the act by which Bushy Park and Marlborough House are given to the executors for twelve months after her majesty's death, is relied upon as showing not any intention to continue the annuity beyond the day of the queen dowager's death, but as raising an inference that the annuity was intended to last up to the actual day of her death, inasmuch as a continuing expense was thereby rendered necessary.

The *Attorney General* claimed the right to reply.

[*Lord Campbell*, C. J. Generally the attorney general, appearing for the crown, is entitled to reply; but when the argument arises upon motion, it seems to be an exception to that rule.]

The *Attorney General* referred to *The Queen v. The Archbishop of Canterbury*, 17 Law J. Rep. (N. S.) Q. B. 252, where the court, without deciding upon the right, heard a reply, guarding against its being drawn into a precedent.

[*Lord Campbell*, C. J. With the same qualification, we will hear any remarks which you think will assist us in deciding the present case.]

The *Attorney General* then replied.

Cur. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. The claim here being for the arrears of an annuity granted under an act of Parliament, and charged upon the consolidated fund, we think that the application for a *mandamus* is regular. The right, if it exists, is a legal right; and there is no efficient remedy without the aid of this prerogative writ. The stat. 4 & 5 Will. 4, c. 15, s. 13, has enacted that the payment of such an annuity can only be obtained by the warrant of the lords of the treasury, and the duty of granting the warrant when the payment is due is imposed upon them.

But it has been contended, that even if we should be of opinion that the sum claimed is legally due, the annuity accruing *de die in diem*, and therefore being apportionable, we ought, in the exercise of our discretion, to withhold the *mandamus*, by reason of the full quarter's annuity paid to her late majesty, on the 30th of June, 1837. We should not think that payment an answer to the application, for it was made as of right, in discharge of a debt then due and payable, after a dispute as to whether in point of law it could be justly claimed. An intimation being communicated to her late majesty that the government made the payment to her after obtaining the opinion of the

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legal advisers of the crown that she was strictly entitled to it, she was fully justified in laying out the money in works of piety or in any manner she thought fit, and it could not afterwards be recovered back from her, or set off against a subsequent quarterly portion of the annuity, even if the payment had been made under a mistake of law. It has been truly said by the attorney general, that a suitor invoking a discretionary interference of the court in his favor, must do justice before he asks justice; but we are of opinion that it would be injustice to require that a sum of money so paid and spent should be afterwards refunded or brought into account. *Skyring v. Greenwood*, 4 B. & C. 281, and a variety of other cases, have been decided upon the principle which guides us in disposing of this objection.

The fate of the rule, therefore, depends upon the question whether the annuity be apportionable; and if it be apportionable, the *mandamus* must issue. After an attentive examination of all the authorities cited, we are of opinion that the annuity is not apportionable.

Were it an annuity granted in similar terms between subject and subject, we conceive there can be no doubt upon the subject. The rule is thus laid down in the preamble to the 4 & 5 Will. 4, c. 22: "By law, rents, *annuities*, and other payments due at fixed and stated periods are not apportionable, unless express provision be made for the purpose." We are not absolutely bound by this recital, but it is very strong evidence of what the law is; and the burden of proving that the legislature has fallen into a mistake is cast upon those who say so. But the rule thus laid down, instead of being liable to the imputation of error, is fortified by a long series of decisions from very ancient to very recent times. The only contrary authorities that have been produced are those respecting annuities for the maintenance of infants and of married women living apart from their husbands. These are treated in the books as *exceptions* to the rule, and will be found to rest not on legal right, but upon the power sometimes assumed by a court of equity to correct the rigor of the common law. One of the cases respecting an annuity to a married woman for her separate maintenance was decided in a court of law, but not in an action of covenant for non-payment of the annuity. In *Howell v. Hansforth*, the annuity had been secured by a bond under a penalty which had been forfeited. De Gray, C. J., there said, "The annuitant may levy the penalty, subject to the equitable interposition of this court, and though rents and common annuities are not apportionable either by law or equity, yet in equity the maintenance of infants is always apportioned up to the day of their deaths. This case depends upon similar principles, the annuities being for a separate maintenance to a *feme covert*." Therefore leave was given to take out execution for the proportional arrears of the annuity between the last quarter day to which it had been paid, and the death of the annuitant. The two equitable exceptions as to infants and married women living separate from their husbands, instead of establishing a rule that annuities granted for maintenance are legally apportionable, confirm the contrary rule. This rule, indeed, is quite familiar to every branch of the profession, and upon such a grant between subject

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and subject, there certainly would have been no apportionment either in the first quarter or the last.

We have now only to consider whether there be any thing peculiar in the grant of this annuity between these royal personages. By the 56 Geo. 3, c. 24, under which a similar annuity was granted to Prince Leopold (now King of the Belgians) on the demise of her royal highness the Princess Charlotte, it is expressly provided that "the first payment thereof shall be on the first quarter day next after the decease of her said royal highness, of such proportion of such quarterly payment as shall have accrued between the day of such decease and such quarter day." There the annuity is expressly made apportionable; but here the counsel for the representatives of her majesty Queen Adelaide are obliged to resort to what they say is impliedly the meaning of the legislature, from the object which was in view "to settle a good, certain, and competent revenue for supporting the honor and dignity of her majesty," and they suggest one state of facts upon which, if the annuity may not be apportioned, the queen might have survived his majesty nearly a quarter of a year, and yet never have been entitled to any allowance as dowager, for he might have died the day after quarter day, and she might have died the day before the next quarter day. This shows that it might have been more prudent to have expressed that the annuity should be apportionable, but does not vary the effect of the language actually employed. The same risk would be run by a private jointress; yet that would not alter the construction of the grant. Where there is no apportionment, more is left to chance; but, the chances being calculated, the advantages are as great to the grantee without as with apportionment. In the event that has happened, although we should refuse this *mandamus*, her majesty will have received her annuity nineteen days more than if an apportionment had been introduced, after the precedent of Prince Leopold's. It cannot be gravely contended that there should be an apportionment in the last quarter, and not in the first; for the apportionment must rest upon the supposition that the annuity was meant to become due, like interest on a mortgage, *de die in diem*; and upon that supposition the annuity could not begin to run till after the demise of King William. But the annuity being made payable on the four quarter days by even and equal portions, "the first payment thereof to be made at such of the said days as shall first and next happen after the decease of his majesty," without any words of qualification, there can be no doubt that the sum of 25,000*l.* became due and payable to her majesty on the 30th of June, the first quarter day after his majesty's decease. For the same reason there could be nothing claimed after the 30th of September, 1849, as her majesty died before the 31st of December following. No demand could be made at the treasury on the 2d of December, the day of her death, for that is not a day of payment named in the act; and when the 31st of December came round, her representatives could not demand 25,000*l.*, as the annuity was only for her life. Nor could they claim a fractional part of the quarter's annuity, as it was to be paid by "even and equal portions." Parliament undoubtedly meant to "make such a

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provision as would be adequate to the maintenance of her majesty's royal dignity;" but Parliament must be supposed to know the legal meaning of the language it employs, and to have supposed that in this way the object was gained as effectually as if the annuity had been made to accrue daily from the death of the king to the death of the queen. Much stress was laid upon the words of the act, "and continue from thenceforth for and during the natural life of her majesty;" but the same or similar words occur in all grants of annuity for life, which, if made payable at fixed times, do not admit of apportionment.

An argument was drawn by some of the counsel for the rule, from the 3d section of the act, which settles upon her majesty Marlborough House and Bushy Park beyond her own life, which is supposed to raise an inference that a pecuniary provision must have been intended to meet this surviving expense. But upon their own construction of the act, there would have been no such provision had she died on a quarter day, and their argument would prove too much, for an estate or interest is given in these houses to her executors, "to continue for one whole year from thence next ensuing." The object evidently was to confer a boon, not a burden, by allowing a twelvemonth for the disposal of her effects in the place where they should happen to be at the time of her decease.

Then recourse is had to the language of the grant, by which it is said to be "in lieu of dower." But the effect of the grant must depend upon the power contained in the act of Parliament; and, further, an annuity granted in the same way to a jointress in bar of dower does not admit of apportionment.

Finally, reliance is placed on the exalted rank of her majesty. We are at a loss to know how this should influence the construction of the language by which provision is made for her. We might as well be told of her exemplary virtues while living, and of her saint-like death, which will ever make her memory cherished with affection and reverence by the English nation. These we are most ready to acknowledge; but we sit here merely as judges to interpret an act of Parliament; and according to the just interpretation of this act of Parliament, we are all clearly of opinion that in the event which has happened no arrears of the annuity can be claimed subsequently to the 30th of September, 1849.

Under the peculiar circumstances of this case we were willing to have allowed the *mandamus* to issue, so that there might have been a more solemn argument after the return, and, the question being put upon the record, it might have been carried to the House of Lords; but both parties having declared that they should be contented with our opinion now, we have only to say that the rule for the *mandamus* must be discharged.

Rule discharged.

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Easter Term, April 28, 1851.

*Conspiracy — Customs — 3 & 4 Will. 4, c. 53 — Limitation of Time
— Persons to the Jurors unknown, Meaning of.*

The 3 & 4 Will. 4, c. 53, s. 120, enacts, that all suits, indictments, or informations exhibited for any offence against that or any other act relating to the custom in any of his majesty's courts of record at Westminster, shall be brought within three years after the date of the commission of the offence:—

Held, that this was confined to indictments to be brought under sects. 75 and 112, in the name of the attorney general, in one of the courts of record at Westminster, and did not apply to an indictment preferred at the assizes for a conspiracy to defraud the queen of certain duties, which was an offence at common law.

An indictment charged A, B, and C with conspiring together and "with divers other persons, to the jurors unknown." The evidence at the trial applied only to A, B, and C. The jury found that A had conspired with either B, or C, but that they could not say with which. The judge directed a verdict of guilty to be entered against A, and of not guilty in favor of B and C:—

Held, (Erie, J., *dissentiente*,) that on this finding A, was entitled to be acquitted, as the words "persons unknown" meant persons other than A, B, and C, and that there was no evidence adduced as to any other persons being concerned.

INDICTMENT for conspiracy. The first count stated that Henry Thompson, late of the parish of Liverpool, in the county of Lancaster, Samuel Tillotson, and Thomas Williams Maddock, on the 13th day of May, in the year of our Lord, 1841, with force and arms, at the parish aforesaid, in the county aforesaid, did unlawfully and fraudulently conspire, combine, confederate, and agree together and with divers other persons to the jurors aforesaid unknown, to cause and procure divers foreign goods which had been and were theretofore imported into the United Kingdom, and which said goods before then had been deposited in certain approved vaults, and upon the removal of which said goods from the said vaults certain duties of customs would be due and of right payable to our said lady the queen, clandestinely and illegally to remove from and out of the said vaults, wherein the said goods had been deposited as aforesaid, without payment of the said duties of customs to our said lady the queen, with intent thereby and then to cheat and defraud our said lady the queen of divers large sums of money then and there being due and payable and then and there about to be due and payable to our said lady the queen, in respect of the duties of customs of this realm, in contempt of our said lady the queen and her laws, to the damage and injury of the public revenue of this realm, and against the peace of the queen.

There was also a second count against the defendants, Thompson, Tillotson, and Maddock, for conspiring together and with divers other persons to the jurors unknown, to procure certain foreign wines deposited in certain vaults to be removed without paying the duties

¹ 20 Law J. Rep. (N. S.) M. C. 183.

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payable on their removal; and a third count stating that they together, and with divers other persons to the jurors unknown, conspired together to defraud the queen of certain moneys payable in respect of duties of customs.

Plea — Not guilty.

The indictment was tried, before Cresswell, J., at the Summer assizes for Lancaster, 1850, when the following evidence was given: The defendant Thompson was a wine merchant, carrying on business at Liverpool, and had a double vault at a place called Harbord's Warehouse, in which the wines he had imported were kept. The vault was secured by two locks, the key of one of which was kept by the merchant, and that of the other by the crown lockers, so that it could not be opened without the concurrence of both parties. In 1840, and the two following years, the defendants Tillotson and Maddock were lockers, and, during that time, the one or the other of them had possession of the key to the vault. The wines, out of the removal of which the present indictment arose, had been taken away in the year 1841. There was no evidence to implicate any other person besides those already named. The jury found that Thompson had conspired with either Tillotson or Maddock to commit the frauds charged, but they could not say with which. It was thereupon objected that this amounted to an acquittal of all the defendants, and also that the indictment could not be sustained, inasmuch as it had not been preferred within the period mentioned in 3 & 4 Will. 4, c. 53, s. 120.¹ The learned judge overruled both objections, and directed a verdict of guilty to be entered against Thompson, and not guilty as to the other two defendants, giving the counsel for the defendant Thompson leave to move to enter a verdict of not guilty as to him on both grounds.

A rule *nisi* having been accordingly obtained to enter a verdict of not guilty as to the defendant Thompson, and for a new trial on the ground of misdirection, —

Sir A. Cockburn, (attorney general,) Knowles, and Edward James

¹ The following are the material sections referred to: Section 75. All penalties and forfeitures incurred or imposed by this or any other act relating to the customs, to trade, or to navigation, shall and may be sued for, prosecuted, and recovered by action of debt, bill, plaint, or information in any of his majesty's courts of record at Westminster, &c., in the name of his majesty's attorney general, or in the name or names of some officer or officers of his majesty's customs, &c.

Sect. 112. No indictment shall be preferred or suit commenced for the recovery of any penalty or forfeiture under this or any other act relating to the customs or excise unless such suit shall be commenced in the name of his majesty's attorney general, or unless such indictment shall be preferred under the direction of the commissioners of his majesty's customs or excise, or unless such suit shall be commenced in the name of some officer of customs or excise, under the direction of the said commissioners respectively.

Sect. 120. All suits, indictments, or informations exhibited for any offence against this or any other act relating to the customs in any of his majesty's courts of record at Westminster, shall and may be brought, sued, or exhibited within three years next after the date of the offence committed, and shall and may be exhibited before any one or more justices of the peace within six months next after the date of the offence committed.

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now showed cause. First, the indictment was not brought too late. It is for a conspiracy to defraud the crown of certain dues, which is an offence at common law, and does not fall within the provisions of the 3 & 4 Will. 4, c. 53, s. 120. The limitation of time mentioned in that section was intended to apply to indictments, suits, and informations of a peculiar nature, preferred in one of the courts of record at Westminster. To hold that it extends to indictments of every kind, or even for every offence specified in the act, would be inconsistent with the language employed, and lead to the most injurious consequences. For instance, by the 58th section, three or more persons assembling to assist in the illegal landing of goods are to be deemed guilty of felony, and to suffer death; yet if the argument on the other side be correct, individuals guilty of such an offence could not be punished unless they were arraigned within three years after its commission. The more obvious as well as the more reasonable inference is, that the legislature meant that it should be confined to those indictments and informations referred to in the 75th and 112th sections, and which are to be brought in the name of the attorney general, or by the direction of the commissioners of the customs. Nor is the question affected by the 8 & 9 Vict. c. 84. That act certainly repeals the 3 & 4 Will. 4, c. 53, but keeps it alive with reference to any arrears of duty or any penalties or forfeitures which may have been incurred. Secondly, the conviction of Thompson was correct. It was not essential that he should have been found to have conspired with Tillotson and Maddock, or with one of them expressly. Their names might have been erased from the indictment, and still it would have been good, or Thompson might have been tried alone and found guilty, and his conviction would not have been vitiated by the subsequent acquittal of the other defendants. *The Queen v. Herne*, cited in *The King v. Kinnersley*, 1 Str. 195. The special finding of the jury is sufficient to support the allegation that Thompson conspired with some other person to the jurors unknown. When a jury cannot tell which of two persons was the co-conspirator, he is as much unknown to them as if they were utterly ignorant of his name and person.

Murphy, Serj., *Cowling*, and *Hugh Hill*, in support of the rule. The indictment is not maintainable. The argument that this is a prosecution for an offence at common law is fallacious. Offences against the customs are entirely creatures of statute, and cannot be freed from the provisions of the statutes by which they have been called into existence, by an attempt to clothe them with a common law character. The 3 & 4 Will. 4, c. 53, s. 120, is therefore applicable. The words employed there must be read distributively, and the word "indictments" considered as referring to indictments for every breach of the law in respect of customs. Again: the offence with which the defendants are charged was made penal only by the 3 & 4 Will. 4, c. 53. But that act has been repealed by the 8 & 9 Vict. c. 84. The transaction, therefore, has ceased to be punishable, and there is nothing for which the party can be arraigned. *The Queen v.*

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Swan, 4 Cox, C. C. 108. Secondly, the conviction of Thompson alone cannot be sustained. It is admitted, indeed, that had he been charged alone, the verdict could not have been disturbed. But he is indicted jointly with Tillotson and Maddock, and they having been found not guilty, he must also be acquitted. The finding of the jury in the alternative is bad for uncertainty, and is quite unprecedented. Neither can Thompson on such a finding be considered to have conspired with a person unknown: by that allegation the grand jury must be taken to mean individuals other than Tillotson or Maddock; and there was no evidence given before the petty jury upon which they could find that any other persons were engaged in the transaction.

LORD CAMPBELL, C. J. I am of opinion that the first objection raised cannot be supported. If we look at the plain language in the 3 & 4 Will. 4, c. 53, s. 120, we perceive at once that it does not embrace an indictment found before a grand jury at a court of oyer and terminer at the assizes, but applies only to suits, indictments, &c., in any of the courts of record at Westminster. The present indictment was not found in one of her majesty's courts of record at Westminster, but at the assizes at Lancaster. But then, it is said that the words in that section must be read distributively, and taken to mean any indictment wheresoever preferred, as well as all suits and informations exhibited for any offence against the act in any of the courts of record at Westminster; but on a reference to the 75th and 112th sections, it is evident that a more limited construction is put on sect. 120, and that it is intended to be confined to such indictments, suits, and informations as are previously mentioned in the 112th section, and does not apply to indictments preferred in all courts for every offence whatsoever connected with the laws of the customs. I think also that the argument used with respect to the repeal of the statute is untenable, because this is an indictment for a conspiracy, an offence at common law, which was consummated as soon as entered into, and entirely out of the act. Her majesty was entitled to certain duties at the time of the conspiracy; it was a misdemeanor to combine in the manner charged to defraud her of them, which might be punished. The second objection, that the finding of the petty jury is invalid, I consider to be insuperable. It is agreed that the evidence produced at the trial applied to no one except the three persons named, Thompson, Tillotson, and Maddock. On this evidence a verdict of guilty was found against Thompson, and of not guilty in favor of Tillotson and Maddock. I think that under these circumstances the verdict against Thompson cannot be sustained. It is conceded, that if there be an indictment against two persons for a conspiracy, the acquittal of one must invalidate the conviction of the other. Then, I cannot draw a distinction between the cases of two and of three persons if one only is found guilty. If three are indicted, and two found not guilty, the third must also be acquitted. Here the jury find that two of the defendants did not conspire with the third, and if so, it is difficult to see how he could conspire with either of them. The only mode that struck me as that

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by which the verdict might be upheld, was by the finding that Thompson conspired either with Tillotson or Maddock, but the jury could not tell with which. I think, however, that an indictment in such a form would be bad for uncertainty; and for the same reason a verdict in a similar form would be equally vicious. But then, it is argued that Tillotson and Maddock may be included in the words "persons to the jurors unknown;" but I cannot say that they can come under the category of persons who are not known to the jury. It is clear that this could not have been the opinion either of the grand or the petty jury. For these reasons I think, although with regret, that a verdict of not guilty should be entered as to the defendant Thompson.

PATTESON, J. I entirely concur in thinking that the first objection is untenable. At the same time, I must say that I have some difficulty in ascertaining what species of indictment is referred to in the 112th section. It certainly cannot mean an indictment for penalties, as by the 75th section penalties can only be recovered by suit, action, or information. But it is unnecessary to consider that point further, as on looking at the 120th section the limitation of time is found to be expressly confined to indictments preferred in one of her majesty's courts of record at Westminster. Now, this is an indictment brought not in one of the courts of record at Westminster, but for a conspiracy at the assizes at Lancaster, and, therefore, it does not fall within the words of the section. On the other point I confess I do not see how, on the evidence produced by the crown, the defendant Thompson could be convicted of a conspiracy with persons to the jurors unknown, for, if I understand the evidence, it applied solely to the three persons named. If it failed to establish that either conspired with Thompson, then it failed to implicate any. But here the jury have acquitted Tillotson and Maddock, and this invalidates the conviction of Thompson. Had the evidence shown that several other persons had been concerned in the transaction, or had the indictment alleged, "that Thompson had conspired with persons to the jurors unknown," without naming any one, then I think that the verdict would have been correct, and could not have been disturbed. But here he has been indicted jointly with two others; and as the crown have failed to show that he was jointly engaged in a conspiracy with both or one of them, I think that the verdict of guilty as against him was wrong, and must be set aside.

COLERIDGE, J. I am of the same opinion on both points. With respect to the first, it will be sufficient to say that the case has not been brought within the 120th section, either as to the court in which the proceeding took place or the matter which was charged. As to the second point, I think that you must read the indictment in the manner in which all indictments should be read, giving to ordinary language the ordinary meaning of common sense. It imports that each of the defendants conspired with the others, and also with

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certain persons to the jurors unknown. Now, what amount of evidence would be sufficient to justify the conviction of each, if tried separately, it is immaterial to consider, for we have to deal with a verdict which found Tillotson and Maddock not guilty of conspiring with Thompson. It is conceded by the crown that there was no evidence to fix any other persons but the three defendants. If the matter had rested there, it would have amounted to an acquittal of Thompson. The difficulty arises from the special declaration of the jury. Still they are acquitted with all the legal consequences of an acquittal. Neither is found to have entered into a conspiracy with Thompson; the case, therefore, is the same as if he had stood alone, and he must also be acquitted.

ERLE, J. I am of the same opinion on the first point. As to the second objection, I regret to say that I differ from the rest of the court. It is clearly conceded by all parties that the defendant Thompson was actually guilty of the offence for which he was indicted. The question before us is, whether the offence which is proved against him has been properly described in the indictment on which he was tried. Now, I take it to be a clear principle that the language of an indictment must be construed by the rules of pleading, and not by the common interpretation put on ordinary language; for nothing indeed differs more widely in construction than the same matter when viewed by the rules of pleading, and when construed by the language of ordinary life. Where there is a joint indictment against several of such a nature that one may be found guilty, the acquittal of the others is quite immaterial; each is tried as if he had been singly indicted. So also with reference to each of them though the same offence may be charged in an indictment in a variety of ways in various counts, and with attendant circumstances of more or less aggravation, if the offence of which the defendant is proved to be guilty is included in the matter charged, he may be found guilty without the circumstances of aggravation, and in any of the forms stated in the indictment. The present indictment comprises a charge of conspiracy in a variety of forms. It alleges that Thompson conspired with Maddock, with Tillotson, and with persons unknown; and if the verdict is against him, it ought to stand. The judge ought to have summed up and taken the opinion of the jury on each defendant. As to Thompson, "Do you think that he did conspire?" The jury say that he did. Then, "Do you think he conspired with Thompson or Maddock?" They reply, "We think that he did with one of them, although we cannot satisfactorily say with which." But this amounts to a declaration that he did conspire with some person unknown; for if the jury are unable to say with which of the other defendants Thompson conspired, then he is as much unknown as if they were utterly unacquainted with his name or person. I think that to construe this indictment according to ordinary parlance would be a violation of the rules of pleading. And as, by an adherence to those rules, the conviction would be sustained, I consider that we

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ought to do so, rather than by the adoption of another course allow the ends of justice to be defeated.

Rule absolute to enter a verdict of not guilty as to the defendant Thompson.

REGINA v. CALDECOTE.¹

Easter Vacation, May 10, 1851.

Order of Removal — Removability — 9 & 10 Vict. c. 66 — Residence — Interruption of, by Execution of prior Order of Removal.

Where a valid order of removal has been *bona fide* executed by taking the pauper to the parish where he is settled, and there delivering him to the overseers, such a removal operates as an interruption of residence within the 9 & 10 Vict. c. 66, however short be the period during which the pauper was actually absent from the removing parish.

A pauper who had resided in the parish of S. since 1835, was in 1845 removed to the parish of C. under a valid order of justices, which was unappealed against, by delivering him to the overseer of C., at his house in that parish. After this removal, but on the same day, an agreement was entered into between the officers of the two parishes, that the pauper should return to S., and be there maintained at the cost of C. The pauper accordingly returned on the same day to S., and slept there that night, and had ever since resided there. He was relieved by C. until the passing of the 9 & 10 Vict. c. 66. In 1847 an order for his removal from S. to C. was made:—

Held, that he was not irremovable.

On an appeal against an order of two magistrates of the county of Leicester, dated the 12th of May, 1847, for the removal of T. Freer the younger and his three children from the parish of Stoke Golding, in the county of Leicester, to the parish of Caldecote, in the county of Warwick, the sessions confirmed the order, subject to the following case:—

The place of the last legal settlement of the paupers was in the parish of Caldecote, to which place they had been removed in May, 1845, under an order of justices, duly executed and unappealed against, bearing date the 22d of April, 1845.

The pauper, T. Freer, had resided in the respondent parish from the year 1835, or thereabouts, with the exception of the period of his and his family's removal, under the said order, dated in April, 1845, which took place as follows: At the time of the execution of the last-mentioned order, the paupers were delivered to one of the overseers of the appellant parish at his house, which was not in the appellant parish, but near thereto, and there they remained about an hour, and received from him 2s. 6d. for relief, after which they were delivered at the request of the first-mentioned overseer at the house of the other overseer of the appellant parish in that parish, where they remained but a few minutes, and had some refreshment from his wife, and then returned to the respondent parish on the same day,

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and slept in the respondent parish the same night. They had been at lodgings there for about three or four months up to the removal, and had previously resided in a dwelling-house there for upwards of twelve months. The return of the paupers to the respondent parish as above stated was in pursuance of an agreement entered into, on the day of and after the removal, between the officers of that and the appellant parish, that the paupers should return to the respondent parish and be relieved there, and that the relief to be afforded should be repaid by the appellant parish, and this arrangement was adhered to up to the time of the passing of the stat. 9 & 10 Vict. c. 66, since which time the officers of the appellant parish have declined to repay any relief.

[The case then set out grounds of appeal, alleging that the paupers were at the time of making the said order irremovable, by reason of their having resided in the respondent parish for five years and upwards next before the application for the said order.]

It was contended, by the respondents, that the present removal was justified on the ground of the removal under the said former order of removal, which was unappealed against, and relief administered as above stated by the hands and at the charge of the appellant parish under it.

It was contended by the appellants, that upon the facts stated the order ought to be quashed upon the objection taken by one or other of the said grounds of appeal. The sessions, being of a contrary opinion, confirmed the order.

If the court should be of opinion that the sessions were right in confirming the order of removal upon the facts above stated, the order of sessions was to stand confirmed. But if the court should be of opinion that upon such facts the order of removal ought to have been quashed, then the order of removal and the order of sessions were to be quashed.

G. T. White, in support of the order of sessions.¹ The fact of the order of removal having been executed by the delivery of the paupers to the officers of the appellant parish, and the order having been afterwards acquiesced in by their not appealing against it, operated as a break in the five years' residence in the respondent parish. This is the effect of the decisions in *The Queen v. Halifax*, 12 Q. B. Rep. 111; s. c. 17 Law J. Rep. (N. S.) M. C. 158; and *The Queen v. Seend*, Ibid. 133; s. c. 18 Law J. Rep. (N. S.) M. C. 12. There could be no *animus redeundi*, here because the paupers had no control over the removal, which was compulsory.

[*Lord Campbell*, C. J. In *The Queen v. Halifax* there was an actual absence from the parish. Must there not be a pernoctation out of it?]

Sleeping is not a test of residence, within the meaning of the 9 & 10 Vict. c. 66.

[*Erle*, J. I do not think it is a test.]

¹ May 7, before LORD CAMPBELL, C. J., PATTESON, WIGHTMAN, and ERLE, JJ.

The order was executed *bona fide* with the object of transferring the burden of supporting the paupers to the parish where they were settled, and the legal effect of such a removal cannot be affected by the agreement subsequently entered into between the two parishes, that the paupers should return to the respondent parish and be there maintained at the cost of the appellants.

Macaulay and *Hayes*, contra. If the argument of the respondents prevails, any constrained absence by force of law, even for a few hours in the day, would take away the right of irremovability.

[*Patteson*, J. That would extend to a taking of the pauper before a justice out of the parish on a charge which is afterwards found untenable. But that is clearly no break of the residence.]

Still, such a case must be included, if a compulsory absence be the test of an *animus redeundi*.

[*Erle*, J. The line of decision in *The Queen v. Halifax* is, that the parish, by getting an order of removal, ceases to acquiesce in the pauper's continuing to reside there.]

Applying that argument to this case, it cannot be carried farther than that such an intention existed for a very short period, but was afterwards abandoned within the day. The word "residence" in poor-law questions always means sleeping. Nolan's Poor Law.

[*Erle*, J. "Residence" has different meanings in different acts. Under the Statute of Bridges, a man is resident if he has ratable property in the county.]

If the pauper did not continue to reside in the respondent parish during these few hours, he was resident nowhere. *The King v. Barham*, 8 B. & C. 99; s. c. 6 Law J. Rep. M. C. 78, and *The King v. Willoughby*, 4 Ad. & E. 143; s. c. 5 Law J. Rep. (N. S.) M. C. 35. In *The Queen v. Holbeck*, 1 Eng. Rep. 245, it is laid down, that the mere absence of a power to return in the pauper will not break the residence if there was an *animus redeundi*. There must be an absence or break of residence in point of fact, before any question of intention can arise.

Cur. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. We are of opinion that the order of removal was properly confirmed by the Court of Quarter Sessions. This case appears to us to be governed by *The Queen v. Halifax*, and *The Queen v. Seend*, establishing the doctrine (which we see no reason to doubt) that in construing the 9 & 10 Vict. c. 66, an executed removal of the pauper, under a valid order of removal, interrupts the continuity of the residence in the removing parish. Here, the paupers returned to the removing parish the same day on which they left it; but they had been removed from it under a valid order of removal, and they had been delivered to the overseers of the parish of their settlement. Not till after this removal was the agreement entered into between the overseers of the two parishes respectively, that the paupers should return to the parish from which they had been removed, and, residing there, should be maintained by the

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parish of their settlement. There was a period of time during which they had ceased to reside in the removing parish, and during which they had no power to return to it. The duration of this period we consider immaterial. The order of removal was valid, and was *bona fide* carried into execution. We do not see how this decision is at all contrary to the policy or the spirit of the act, for the continuity of residence cannot be thus interrupted so as to prevent the irremovability from being acquired, unless the pauper becomes chargeable; and the legislature only intended that the irremovability should be acquired by a five years' residence without bringing any charge upon the parish. A fictitious chargeability by fraudulent relief is guarded against by penalties, and the apprehension of such a possibility cannot affect the decision of a case where the removal took place before the passing of the 9 & 10 Vict. c. 66, and could not have proceeded from any fraudulent motive. The rule for quashing the order of sessions must, therefore, be discharged. *Order of sessions confirmed.*

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Bail Court, Hilary Term, January 30, 1851.

Jurisdiction of Justices — Praying Sureties of the Peace — Conviction of Assault.

An information made before a magistrate stated that the informant, having been assaulted and beaten by another person, prayed that he might be bound over to keep the peace towards him. On the magistrates' before whom the case was heard, proceeding to deal with the merits of the question of the assault, the informant protested against their adjudicating upon it:—

Held, that the justices had no jurisdiction to convict summarily the offending party of the assault against the will of the informant, as under the stat. 9 Geo. 4, c. 31, s. 27, the justices have no jurisdiction to convict of an assault, unless the party aggrieved complain of that assault before them, with a view to their adjudicating upon it.

THIS was a rule, on the part of one Edwards, calling upon John Deny, Esq., and two other magistrates of the county of Devon, and one Mitchelmore, to show cause why a *certiorari* should not issue to bring up a conviction made by the said justices, whereby Mitchelmore was convicted of an assault and ordered to pay a fine, for the purpose of having the conviction quashed.

It appeared from the affidavits that a quarrel had taken place between Edwards and Mitchelmore; that Mitchelmore struck Edwards, and threatened to do the same to him again whenever he met him. Edwards thereupon went before a justice, and laid an information against Mitchelmore, which stated that Edwards having been assaulted and beaten by Mitchelmore, against the form of the statute in such case made and provided, prayed sureties of the peace against

¹ 20 Law J. Rep. (N. S.) M. C. 189.

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him. The case was heard before the justices mentioned in the rule. Edwards called witnesses, who proved the circumstances of the assault and threat. The magistrates then, after consulting their clerk, stated their intention to convict Mitchelmore of the assault, under the stat. 9 Geo. 4, c. 31, s. 27, as well as to bind him over to keep the peace. Whereupon Edwards stated that he did not complain of the assault before them, but that his only application to them was that Mitchelmore should be bound to find sureties to keep the peace; and that he intended to take proceedings in another court against Mitchelmore for the assault, and he protested against their adjudicating summarily upon the assault.

Ball, on behalf of the justices; and

Collier and *Kingdon*, on behalf of Mitchelmore, now showed cause. The rule ought not to be granted. The justices had authority to convict Mitchelmore of the assault. The conviction is good on its face. This court, therefore, will not grant the *certiorari*. *Anonymous Case*, 1 B. & Ad. 382. The information alleged that an assault had been committed, and Edwards proved that an assault had been committed upon him. The justices, therefore, had jurisdiction to deal with the matter according to law. The information is ambiguous in its terms. The justices, from its language, might well suppose that Edwards complained of the assault.

[*Erle*, J. Was not all ambiguity removed by Edwards's protesting against the justices' adjudicating on the assault?]

The conclusion which the justices drew from the facts was, that Edwards intended to make a charge of assault. The hearing before the magistrate is a bar to any action for the assault. *Tunnichiffe v. Tedd*, 5 Com. B. Rep. 553; s. c. 17 Law J. Rep. (N. S.) M. C. 67. By the stat. 9 Geo. 4, c. 31, s. 27, under which the conviction took place, the writ of *certiorari* is taken away. See sect. 36. It is true that, where the justices act entirely without jurisdiction, the court may issue a *certiorari* if they please. But assuming that the justices had no jurisdiction, this, it is submitted, is not a case in which the court will in its discretion grant the writ. *The King v. Bass*, 5 Term, Rep. 251. *The King v. Tod*, 1 Str. 530. *The Queen v. The Committee-men for the South Holland Drainage*, 8 Ad. & E. 429; s. c. 8 Law J. Rep. (N. S.) Q. B. 64. *The Queen v. Bolton*, 1 Q. B. Rep. 66; s. c. 10 Law J. Rep. (N. S.) M. C. 49. *The Queen v. The Cheltenham Paving Commissioners*, Ibid. 467; s. c. 10 Law J. Rep. (N. S.) M. C. 99.

Crowder and *Phinn*, in support of the rule, were not called upon.

ERLE, J. This rule must be made absolute. It is clear law that a party assaulted has several remedies. He may proceed by indictment or by action, or he may apply for a summary conviction before two magistrates under the statute. If he applies to the magistrates, he is barred from other remedies. But the magistrates have no juris-

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diction to convict summarily and impose a fine for the assault, when it is an established fact that the complainant before them does not intend to give the magistrates jurisdiction to deal with the assault. I fully agree, that if it be left open to doubt, whether the party has or has not given jurisdiction to the magistrate, every intendment must be made in favor of the magistrates. But here, when the information was laid, Edwards left no doubt that his application was to bind Mitchelmore over to keep the peace, and the magistrate who issued the information could have had no doubt about it. When the matter came on before the subsequent magistrates, I agree, that during part of the proceedings it may well have been open to doubt, whether the assault was not a matter of which Edwards was complaining; but if the justices at any time doubted, that doubt must have been removed by the applicant protesting against their deciding on the assault. They nevertheless consulted their officer, and thinking that they had jurisdiction, exercised that jurisdiction, and proceeded to convict. I can well understand that the magistrates were anxious to put an end to the matter between the parties by a summary conviction; but I am not on that account at liberty to give any other answer to the question of fact, whether Edwards did make a complaint before them of the assault so as to give them authority to convict; for I have no doubt, that from the very beginning Edwards intended to have recourse to ulterior proceedings. I am also of opinion that the matters of discretion, which have been adverted to, do not authorize me in refusing to make this rule absolute.

Rule absolute.

REGINA V. SHAVINGTON-CUM-GRESTY.¹

Easter Term, May 7, 1851.

Order of Removal — Removability — Relief to Parent on Account of Child — 4 & 5 Will. 4, c. 76, s. 56 — 9 & 10 Vict. c. 66, s. 1.

Relief given to a parent on account of his children is relief received by the children within the proviso of the 9 & 10 Vict. c. 66, s. 1.

The paupers, who were under the age of sixteen and unemancipated, had resided in the township of M. for eight years. For the first five years they resided with their mother, who was a widow, and in receipt of relief for her own and their support; for the last three years they had themselves received relief:—

Held, that they were removable from M.

On an appeal to the Quarter Sessions for the borough of Manchester, against an order bearing date the 26th of March, 1850, for the removal of John Irish, aged fifteen years, Sarah Anne Irish, aged eleven years, and Peter Irish, aged eight years, the lawful orphan children of Peter Irish, by Anne, his wife, both deceased, from the township of Manchester to the township of Shavington-cum-Gresty,

¹ 20 Law J. Rep. (N. S.) M. C. 194. 15 Jur. 560.

in the county of Chester, the court confirmed the order, subject to the following case :—

The paupers resided, in fact, in the township of Manchester, for eight years next before the application for the order appealed against. For the first five years of such period, the mother of the paupers was a widow residing with them, and in receipt of relief from the appellant township, for the support of herself and the paupers, her legitimate children. Ever since the death of their mother, which took place three years before the application for the order in question, the paupers had received relief from the township of Manchester. The paupers were respectively under the age of sixteen years, and unemancipated, whilst so residing with their mother.

Upon these facts, it was contended by the respondents that the paupers were removable: first, because, being children unemancipated and under the age of sixteen, they were to be considered as part of the father's or mother's family, as the case might be; that the residence of the parent was the residence of the children; and that the paupers had not resided for five years since the death of their mother in the respondent parish, so as to confer removability. Second, because, during the life of their mother, the paupers had received relief from a parish, or had at least been in part maintained by a rate or subscription raised in a parish in which they did not reside, (not being a *bona fide* charitable gift,) within the meaning of the proviso of 9 & 10 Vict. c. 66, s. 1. Third, because the mother of the paupers was during her lifetime removable under the last proviso of the said section, and therefore the paupers were now removable.

For the appellants, it was contended that the paupers were irremovable: first, because they had resided in fact and within the meaning of the 9 & 10 Vict. c. 66, s. 1, in the respondent parish for five years next before the application for the order. Second, because the relief received by the mother of the paupers from the appellant township, under the circumstances above stated, and the maintenance, if any, thereby afforded to her, and the paupers, her children, residing with her, must be taken to be relief afforded to the head of the family, and not to the children; and at all events, by the provisions of the 4 & 5 Will. 4, c. 76, s. 56,¹ which is to be construed as one act with the 9 & 10 Vict. c. 66, must be considered as given to the widow, that is, the mother of the paupers, having been given to or on account of a child or children under the age of sixteen of such widow. Third, because the last proviso of the 9 & 10 Vict. c. 66. s. 1, was inappli-

¹ The 4 & 5 Will. 4, c. 76, s. 56, enacts, "That all relief given to or on account of the wife, or to or on account of any child or children under the age of sixteen, not being blind, or deaf, or dumb, shall be considered as given to the husband of such wife, or to the father of such children, as the case may be; and any relief given to or on account of any child or children under the age of sixteen of any widow shall be considered as given to such widow; provided always, that nothing therein contained shall discharge the father and grandfather, mother and grandmother of any poor child from their liability to relieve and maintain such poor child, in pursuance of the provisions of a certain act, passed in the forty-third year of the reign of her late majesty Queen Elizabeth, intituled, 'An Act to relieve the Poor.'"

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cable, inasmuch as there was in this case no person in existence having children, and the terms of such proviso were therefore unsatisfied.

The question for this court was, whether, under the circumstances above stated, the said paupers were or were not, at the date of the making of the said order, removable from the respondent to the appellant township. If the court should be of opinion that the paupers were removable at the date of the making of the order, then such order was to be confirmed. If the court should be of a contrary opinion, then the order was to be quashed.

Pashley, in support of the order of sessions. There was not a five years' residence by the paupers, within the 9 & 10 Vict. c. 66, s. 1. The object of that act was strictly to exclude from the computation of the time the period during which relief is received. Had the mother of the paupers been alive, she might have been removed, and they would have been removable with her. The contention on the other side will be, that they are protected by the 4 & 5 Will. 4, c. 76, s. 56, which enacts, that relief given to or on account of children of a widow shall be considered as given to the widow; but that provision was introduced merely to prevent pauper parents' escaping chargeability by seeking relief for their children only. It does not prevent relief so given from being relief given to the children as well as to the parent. According to the true construction, the relief given on account of the children is afforded to them as well as the parent.

Couch, contra. The paupers have resided for a longer period than five years in Manchester; *prima facie*, therefore, they have become irremovable; and it is for the respondents to show that they are not. The language of the 76th section of the Poor Law Act is perfectly explicit, and will not admit of the construction attempted to be put on it. Had the legislature intended that the relief given on account of a child under sixteen and living with its parent should be considered as relief afforded to the child, they would have introduced words to that effect.

LORD CAMPBELL, C. J. I am of opinion that, according to the true construction of the 9 & 10 Vict. c. 66, s. 1, the paupers were removable. The end contemplated in passing that act was to render persons irremovable where there had been an industrial residence for five years; but at the same time to exclude all cases in which parochial relief had been conferred. In the present instance, the paupers had resided for eight years in Manchester; for the first five years their mother, a widow, lived with them, and received relief for her own and their support; for the last three they had themselves received relief. Now, the entire reliance is placed on the 4 & 5 Will. 4, c. 76, s. 56, which says that the relief given to such a child is to be considered as given to the widow. But the object of the legislature in introducing that provision was not to exclude it from being relief to the children as well as the parents, but to render the parents removable with their families when they had become chargeable. I think

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therefore, that it does not affect the construction to be put on the 9 & 10 Vict. c. 66, s. 1, and that these children having been maintained at the expense of the parish during the whole period of their residence, did not acquire the right of irremovability.

PATTESON, J. The latter proviso of the 9 & 10 Vict. c. 66, s. 1, relates only to cases where the parent is alive; but the earlier one is strictly applicable. According to the correct construction of the 4 & 5 Will. 4, c. 76, s. 56, the relief given to a parent on account of his child is to be considered as relief bestowed on the child as well as the parent; and as the children in this case have received such relief, they are removable.

WIGHTMAN and ERLE, JJ., concurred.

Order of sessions confirmed.

REGINA v. FOULKES & others.¹

Bail Court, Michaelmas Term, November 22, 1850.

Certiorari to remove Indictment — Application by one of several Defendants — Recognizance to pay Costs if any Defendant convicted.

The court will grant a *certiorari* to remove an indictment for conspiracy, on the application of one of the several defendants, without the consent of the others, if that defendant will enter into a recognizance to pay costs if either himself or any of the other defendants are convicted.

THIS was a motion, on the part of Foulkes, for a *certiorari* to remove an indictment against himself and others for a conspiracy from the Central Criminal Court into the Court of Queen's Bench.

The consent of the other defendants had not been obtained to the motion; but Foulkes was willing to enter into recognizances to pay the costs if himself or any of the defendants were convicted.

Lush, in support of the motion. The defendant Foulkes could not dispute his own recognizance after having entered into it.

PATTESON, J. Though there is no precedent for such a course, I see no objection to granting the application. You may have the rule, upon Foulkes's entering into a recognizance to appear and plead, and to pay the costs if any one of the defendants be convicted.

Rule granted.

¹ 20 Law J. Rep. (n. s.) M. C. 196.

Regina v. St. George, Bloomsbury.

REGINA v. ST. GEORGE, BLOOMSBURY.¹

Easter Term, May 7, 1851.

Apprenticeship — Allowance — 3 & 4 Will. 4, c. 63 — 2 & 3 Vict. c. 71 — Metropolitan Police Magistrate.

By the 3 & 4 Will. 4, c. 63, s. 3, indentures for binding parish apprentices within any city, &c., are to be allowed by two justices, one acting for and on behalf of the county, and the other for and on behalf of the city, &c., within the limits of which the child is bound. By the 2 & 3 Vict. c. 71, s. 14, a single police magistrate sitting at a police court may do any act directed to be done by more than one justice. A pauper was bound apprentice by the parish of A, which was situate within the city and liberty of Westminster, into the parish of B, in the county of Middlesex. Justices for the county of Middlesex have concurrent jurisdiction, and usually act in the liberty of Westminster:—

Held, that the indenture of apprenticeship was properly allowed by a single police magistrate.

ON an appeal against an order for the removal of J. White, a pauper, from the parish of St. Anne, Westminster, in the county of Middlesex, to the parish of St. George, Bloomsbury, in the said county, the sessions confirmed the order subject to the opinion of this court on the following case:—

It was proved by the respondent parish that the pauper J. White had gained a settlement by apprenticeship in the appellant parish, if the indenture under which he served was valid in point of law. [The case then set out an indenture of apprenticeship by the parish officers of St. James within the liberty of Westminster to the appellant parish, and the following allowances subscribed thereto:] “City and liberty of Westminster, in the county of Middlesex, and Police Court, Great Marlborough Street, within the metropolitan police district, to wit: I, H. M. Dyer, Esq., whose name is hereunder written, one of her majesty’s justices of the peace for the city and liberty of Westminster and county of Middlesex, and a magistrate of the police courts of the metropolis, sitting at the Police Court in Great Marlborough Street, within the metropolitan police district, do consent to the putting forth of J. White as an apprentice to E. Hunt, according to the intent and meaning of this indenture, and do sign this my allowance of such indenture of apprenticeship before the same hath been executed by any of the other parties thereto, in pursuance of the statute, &c. Dated, &c.

“H. M. Dyer, (L. s.)”

“City and liberty of Westminster, in the county of Middlesex, and Police Court, Great Marlborough Street, within the metropolitan police district, to wit: I, H. M. Dyer, Esq., whose name is hereunto written, one of her majesty’s justices of the peace in and for the city and liberty of Westminster and county of Middlesex, and a magistrate of the police courts of the metropolis, sitting at the Police Court at Great Marlborough Street within the metropolitan police district, do consent to the putting forth of J. White as an apprentice to E.

¹ 20 Law J. Rep. (N. S.) M. C. 200.

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Hunt, according to the intent and meaning of this indenture, it having been proved upon oath before me, that due notice in writing has been given by the church-wardens and overseers of the poor of the parish of St. James, within the liberty of Westminster, to the overseers of the poor of the parish of St. Anne, within the liberty of Westminster, in the county of Middlesex, in which said parish the within-mentioned apprentice is to serve, of such binding being intended, and do sign this my allowance of such apprenticeship before this indenture hath been executed by any of the other parties thereto in pursuance of the statute, &c. Dated, &c.

“H. M. Dyer, (L. s.)”

The liberty of Westminster is wholly within both the county of Middlesex and the metropolitan police district, and the commission of the peace for the liberty does not contain any *non intromittant* clause, and justices of the peace for the county have concurrent jurisdiction, and usually act in the liberty. It was contended, by the appellants, that the indenture was illegal, and that no settlement could be gained under it, because the order and allowance required by the statute were, in fact, made by Mr. Dyer only, and that although Mr. Dyer was a magistrate of the metropolitan police courts duly sitting at a police court within the liberty, and within the metropolitan police district, he had not by reason thereof authority to sign both the allowances required by the statute, but that the two allowances ought to have been made by two different justices, one in respect of the county of Middlesex, and one in respect of the city and liberty of Westminster, although each justice might be empowered to act in both jurisdictions. The question for the opinion of the court was, whether under the objection stated the above indenture was duly allowed in conformity with the statute. If the court should decide the question in the affirmative, the order of sessions was to stand confirmed, otherwise the order of sessions and the order of removal were to be quashed.

Pashley, in support of the order of removal. The single question is, whether this binding is sufficiently allowed. It will be said, that a single police magistrate could not allow this indenture. But by the 2 & 3 Vict. c. 71, s. 14, any police magistrate sitting at a police court may alone do any act which by any law in force is directed to be done by more than one justice. The legislature uses the most general words there to embrace every possible case. *The Queen v. Tyrohiit*, 19 Law J. Rep. (N. S.) M. C. 249. Now, the 56 Geo. 3, c. 139, s. 2, required that where the binding should be into a different county or jurisdiction from that in which the binding parish is situate, the indenture should be allowed by two justices of each county or jurisdiction. This statute required four justices to act, and, therefore, the 3 & 4 Will. 4, c. 63, was passed, sect. 3 of which provides for giving to justices of a city, &c., concurrent jurisdiction with county magistrates in apprenticing children within the limits of such city, &c.; and enacts that every indenture for the binding of

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parish apprentices within any city, &c., shall be allowed by two justices, one of such justices acting for and on behalf of the county, and the other of such justices acting for and on behalf of the city, &c., within the limits of which such child shall be bound. This section cannot be read literally, for where both parishes are within the same city, and there is a *non intromittant* clause, it would be impossible to carry it out. The object was to give a concurrent jurisdiction where none existed before, and the words "binding within any city" must be read as "binding into or out of any city." Here, however, there is a concurrent jurisdiction, and the provisions of that section are not needed. But, assuming that this section does apply to the present case, and that it would be generally requisite for two justices for the county and liberty to act together, a single police magistrate is equivalent to both if he sits at a police court, and he may alone allow the indenture.

Hodges, contra. There are here two separate jurisdictions, and it is required that a justice belonging to each of these jurisdictions should act at the same time. Two classes of justices must concur. *The King v. Shipton*, 8 B. & C. 772; s. c. 7 Law J. Rep. M. C. 21. A police magistrate may act alone where two justices of the same jurisdiction might act, but he cannot fulfil the character of two justices of two distinct classes. If this had been a case of a binding from one county to another, as from Middlesex to Surrey, a single police magistrate might have acted under the 3 & 4 Will. 4, c. 63, s. 1, which renders an allowance by two justices, each of whom acts for both counties, sufficient. But the language is very different in sect. 3, the object there being to give concurrent jurisdiction, and, therefore, to require a justice for the city to act independently in the allowance. The power given by that section is consequently not affected by the 2 & 3 Vict. c. 71, s. 14.

LORD CAMPBELL, C. J. The legislature seems to have intended universally to empower a police magistrate sitting at a police court to do any act which would otherwise require two justices, and the language employed is sufficiently large to carry that purpose into effect. Now, this allowance is an act which is required to be done by two justices; therefore, it may well be done by a single police magistrate at a police court. In *The Queen v. Tyrwhitt*, we said the language of the 2 & 3 Vict. c. 71, is very large, and it would be highly to be regretted if some acts requiring two justices could be done by a police magistrate, and others not.

PATTESON, J. Two justices acting for the district would have been sufficient to allow this indenture under the 3 & 4 Will. 4, c. 63, and the words of the Metropolitan Police Act are so general that I cannot restrain them.●

WIGHTMAN and ERLE, JJ., concurred.

Order of sessions confirmed.

Regina v. The Inhabitants of St. James's, Colchester.

REGINA v. THE INHABITANTS OF ST. JAMES'S, COLCHESTER.¹

Bail Court, Easter Term, May 7, 1851.

Certiorari to remove Order of Sessions — Affidavit of Service on Justices — Justices present at the Sessions — Justices' Names appearing in Caption of Order.

The affidavit of service of notice of an intention to apply for a *certiorari* to remove an order of sessions, under the stat. 13 Geo. 2, c. 18, s. 5, stated that the notice was served on A B and C D, two of the justices of the peace in and for the county of S., and stated that the deponent was present at the Quarter Sessions on a particular day, "and did then and there see the said A B and C D, acting as justices of the peace for the said county of S. at the said General Quarter Sessions of the Peace." The order of sessions, which purported to be made on the day to which the affidavit referred, contained in the caption the names of A B and C D, as two of the justices before whom the sessions were holden.

The court quashed the *certiorari*, on the ground that the affidavit did not show that A B and C D were two of the justices by and before whom the order was made, and that no presumption could be drawn that they were present when the order was made from the circumstance of their names appearing in the caption.

THIS was a motion to quash a *certiorari* which had issued to bring up an order of the Quarter Sessions of the county of Shropshire.

The order of Quarter Sessions commenced as follows: "Shropshire, to wit. At the General Quarter Sessions of the Peace of our sovereign lady the queen, held at, &c., on the 14th day of October, in the fourteenth year of the reign of our sovereign lady Victoria, &c., before Sir Baldwin Leighton, Bart., Right Honorable Edward James Earl of Powis, John Thomas Smitheman Edwardes, George Pritchard, Esqs., and others their associates, her majesty's justices assized to keep the peace in the county aforesaid," &c. "Upon the hearing of an appeal, &c., the court doth order that the order of, &c., be confirmed," &c.

Notice of an intention to apply for a *certiorari*, on behalf of the inhabitants of the parish of St. James, Colchester, to remove the order of sessions into the Court of Queen's Bench, had been duly served on Sir Baldwin Leighton, Bart., and John Thomas Smitheman Edwardes, Esq. The notice was signed "J. S. Barnes, attorney for the inhabitants of the said parish, and for Joseph Savill, one of the said inhabitants."

The affidavit verifying the service of the above-mentioned notice stated that this deponent "did, on the 6th of February, 1850, personally serve John Thomas Smitheman Edwardes, one of her majesty's justices of the peace in and for the county of Salop, with the notice hereunto annexed." It in like manner verified the service on Sir B. Leighton, and described him as a justice in like terms. The affidavit then proceeded: "And this deponent also further saith that he was present at the General Quarter Sessions of the Peace, holden at Shrewsbury, in and for the county of Salop, on or about the 14th day of October last, past, and did then and there see the said John

¹ 20 Law J. Rep. (N. S.) M. C. 203. 15 Jur. 467.

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Thomas Smitheman Edwardes and the said Sir Baldwin Leighton, Bart., acting as justices of the peace for the said county of Salop at the said General Quarter Sessions of the Peace."

One ground on which the rule *nisi* was obtained was, that it did not sufficiently appear that the justices who were served with the notice were two of the justices who made the order of sessions.

Barnard showed cause. It is submitted that coupling the order of sessions with the affidavit, it sufficiently appears that the justices who were served with the notice were two of the justices who made the order. After the cases of *The Queen v. Darton*, 2 Dowl. & L. P. C. 498; s. c. 14 Law J. Rep. (n. s.) M. C. 41; *The Queen v. Cartworth*, 5 Q. B. Rep. 201; s. c. 13 Law J. Rep. (n. s.) M. C. 26; and *The Queen v. Gilberdike*, 5 Q. B. Rep. 207; s. c. 13 Law J. Rep. (n. s.) M. C. 46, it must be conceded that it is necessary, under the stat. 13 Geo. 2, c. 18, s. 5, that the justices served with the notice must be parties to the making of the order, and that it is not enough to show that they were present at the sessions. This case, however, is very distinguishable, for in none of those cases did it appear that the justices served were named in the caption of the order; and in *The Queen v. Cartworth*, it may be inferred from Lord Denman's observations, that had the names of the parties been stated in the caption, his opinion probably would have been different. As here the names of the parties served with the notice appear in the caption of the order, the court, it is submitted, will, in the absence of proof to the contrary, assume that the justices mentioned in the caption of the order were present in court at the time the order was made. In *The Queen v. Sevenoaks*, 7 Ibid. 136; s. c. 14 Law J. Rep. (n. s.) M. C. 92, the notice which was served on two of the justices named in the caption was held sufficient.

Scotland, in support of the rule, was not called upon.

COLERIDGE, J. The provision in the act of Parliament on which the question turns, the 5th section of the 13 Geo. 2, c. 18, was made for the better preventing vexatious delays and expense occasioned by the suing forth writs of *certiorari*. By this section it is imposed as a condition upon the granting, allowing, and issuing of the writ for the removal of any conviction, judgment, or order, that six days' notice shall be given to two of the justices by and before whom the conviction, judgment, or order is made, and it adds as the object and reason of such notice, to the end that such justices may, if they think fit, show cause against the issuing or granting of the writ. It is perfectly clear, therefore, that the statute intended that the very justices who made the order should be the parties to receive the notice. The words of the clause express this with great care, for the phrase is not simply the justices "before whom," but "by and before whom" the order or conviction is made; and the object is in order that they may show cause. That could never be done effectually except by the justices who had taken part in the making of the order

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in question. The other justices might not know any thing of the merits of the case. That being so, I have to see whether the affidavit here makes out that the justices served with the notice were two of the justices by and before whom the order was made. The evidence that they were so, it is urged, is contained partly in the affidavit and partly in the caption of the order of sessions. I do not, I confess, see how the caption helps the case at all. We all know that many magistrates assemble on the first day of the sessions, and that on the second or subsequent day, on one of which the order was probably made, the number of justices present is reduced to two or three. I do not see also what connection the caption has with the affidavit made on behalf of the party suing out the *certiorari*. The caption does not help the supposition that the justices whose names were mentioned in it were present at the time when the order was made. The affidavit merely shows that the two who were served with notice were present at the sessions on the day when the order was made, and that the deponent saw them then and there acting as justices. It does not show that the order was made by and before them, but I am asked to presume that it was so made. Now, I have a great objection to making presumptions of this kind when the affidavit could have been made in one form just as easily as in another, and it would save a great deal of trouble if parties would take the words of the act of Parliament and follow them. In the case of *The Queen v. Darton*, the court in quashing the *certiorari* seems to have proceeded upon the ground that it did not appear that the justices served with the notice were present at the hearing of the appeal in which the order was made. That case, it appears to me, ought to be fully carried out; and I think that, as the statute was made to prevent vexatious delay and expense occasioned by the suing out of writs of *certiorari*, we ought not to make any presumption in favor of the sufficiency of the service. This rule, therefore, must be made absolute.

Rule absolute.

REGINA v. THE INHABITANTS OF THE TOWNSHIP OF OSSETT.¹

Easter Term, May 3, 1851.

Settlement — Serving an Office — Clerk to District Church —
3 W. & M. c. 11, s. 6.

A pauper had been appointed to the office of clerk of a district church, in the township of A., established under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, by the curate of such district church, and continued to act in the said office for eight years, with the knowledge of the vicar of the parish of which the district formed a part, and without any attempt having been made to remove him:—

Held, that by serving such office the pauper acquired a settlement in the township of A., under the stat. 3 W. & M. c. 11, s. 6.

¹ 20 Law J. Rep. (N. S.) M. C. 205.

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On an appeal, against an order of two justices, bearing date the 19th of February, 1849, by which the settlement of David Townend, a lunatic pauper in the asylum at Wakefield, was adjudged to be in the township of Ossett, in the West Riding of the county of York, and maintenance ordered, the Court of Sessions, held at Wakefield in the said Riding, in January, 1850, confirmed the order, subject to the opinion of this court on the following case:—

On the trial of the appeal, it was admitted by the appellants, that the pauper was settled in their township of Ossett, unless he had gained, as they contended that he had, a subsequent settlement in the respondent township, by being appointed to and serving the office of clerk of Alverthorpe Church in the respondent township, from the spring of the year 1828 to August, 1834, under the following circumstances: The respondent township of Alverthorpe with Thornes, which consists of the hamlet of Alverthorpe and the hamlet of Thornes, is in the parish of Wakefield, in the county of York, in the diocese of York, and the said Alverthorpe Church is in the said hamlet of Alverthorpe, and was erected at the expense of the parliamentary commissioners, under the 58 Geo. 3, c. 45, and the 59 Geo. 3, c. 134. It was begun in 1823, and completed in 1826. A district was assigned to the said church by an order in council, bearing date the 19th of July, 1830, and duly advertised in the London Gazette, and the provisions of the several acts of Parliament then in force were complied with. The district assigned to the church comprised the whole of the hamlet of Alverthorpe and part of another township, (Stanley-cum-Wrenthorpe,) also in the same parish of Wakefield, but no part of the hamlet of Thornes. The hamlet of Thornes has a church of its own, to which it is assigned as an independent district. In the year 1825, the commissioners duly assigned a stipend to the minister, and a salary of 15*l.* a year to the clerk of the said Alverthorpe Church, to be paid out of the pew rents. At the time the said church was built the Rev. S. Sharpe was, and still is, vicar of the parish of Wakefield, and on the opening of the said church appointed Benjamin Beaumont to be clerk of the said church. In the year 1826, the Rev. Peter Blackburn was duly appointed by the Rev. S. Sharpe to be minister of the said church, and was also duly licensed for that purpose. In the spring of the year 1828, Mr. Blackburn, without consulting the said Rev. S. Sharpe, (as Mr. Blackburn considered that the appointment of the clerk was in him,) dismissed the said B. Beaumont, the then clerk of Alverthorpe Church, and verbally appointed David Townend, the pauper, clerk of that church, at the yearly salary of 15*l.* Shortly after this the Rev. S. Sharpe, as vicar of Wakefield, told Mr. Blackburn that he had no right to dismiss Beaumont from the office of clerk, as he, the vicar, considered that the office was vested in him, the vicar. No steps, however, were taken by the said vicar or by Beaumont to remove the pauper and reinstate Beaumont. The pauper, upon such appointment, began and continued to act as clerk for about eight years from the time of such appointment, when the minister of the church ceased to employ a clerk. During the whole time when he so served the said office of clerk he resided with his family

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in the hamlet of Alverthorpe, in the respondent township, and within the district assigned to the said Alverthorpe Church. About November, 1830, Mr. Blackburn ceased to be minister of Alverthorpe Church, and was succeeded by the Rev. W. F. Alderson, who was duly appointed by the Rev. S. Sharpe, and licensed in that behalf. There was no express appointment of the pauper as clerk of the said church excepting the above-mentioned appointment by Mr. Blackburn, in 1828. Mr. Alderson, when he became the minister of the church, did not expressly appoint the pauper to be clerk. He found him there, acting in that capacity when he became minister, and left him in that situation when he ceased to be minister, as he did in 1834. There is no other incumbent of the parish of Wakefield excepting the vicar. The Rev. J. Morant was appointed curate of Alverthorpe Church, by the said vicar of Wakefield, in the spring of the year 1834, and duly licensed thereto by the Archbishop of York on the 25th of March, 1834, and he continued curate of Alverthorpe, and performed the duties as such curate thereof, for several years immediately succeeding his appointment. The pauper was acting as clerk of Alverthorpe when Mr. Morant was appointed curate thereof, and performed the duties of clerk of that church during all the time the said Mr. Morant was curate. Mr. Morant never made any appointment of the pauper as clerk of the said church, and did not know by whom he had been appointed. The said P. Blackburn, W. F. Alderson, and J. Morant, during the respective times they were curates as aforesaid, never received any salary from the vicar of Wakefield or out of the endowment of the vicarage of Wakefield, but each of them, during the time being, as such curate, received the whole of the stipend assigned unto the spiritual person, for the time being appointed to serve the said church, by the before-mentioned assignment of September, 1825, and also a provision for an endowment for the minister for the time being of Alverthorpe Church, out of Queen Anne's Bounty Fund. Alverthorpe Church never had any separate church-wardens of its own, the church-wardens being appointed for the parish of Wakefield, and one of those church-wardens being resident in the township of Alverthorpe with Thornes, and being considered as acting for and representing the township of Alverthorpe with Thornes, although, in fact, appointed for the whole parish of Wakefield.

If this court should be of opinion that, under the above circumstances, the pauper gained a settlement by the execution of the said office of clerk, the order of sessions and the order of justices were to be quashed; but if of a contrary opinion, the said orders were to stand confirmed.

Pashley, in support of the order of sessions. The pauper cannot be said to have executed a "public annual office" within the meaning of the 3 W. & M. c. 11, s. 6. Under the stats. 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, establishing the district church, the clerk can only be considered as an assistant *quoad sacra*.

[*Lord Campbell*, C. J. He performs the same duties as the clerk

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in a parish. There can be no good objection as to the functions of the office.]

In *Helsington v. Over*, 2 Bott, P. L. 243, and *The King v. The Inhabitants of Wantage*, 2 East, 65, it was decided that the office of curate of a parish did not confer a settlement under the statute in question.

[*Lord Campbell*, C. J. The pauper here is appointed for a year, and his tenure of office therefore seems unobjectionable.]

But it appears that his appointment never was made by the vicar.

[*Lord Campbell*, C. J. We are not now to try whether he was regularly in the office or not.

Wightman, J. Would not the vicar's assent be enough?]

The court will not infer assent. The mere non-interference to try the right cannot be taken to have conferred the office on the pauper. *Roberts v. Price*, 4 Com. B. Rep. 231; s. c. 16 Law J. Rep. (N. S.) C. P. 169; and *The King v. The Inhabitants of Stogursey*, 1 B. & Ad. 795; s. c. 9 Law J. Rep. M. C. 48. Unless legally appointed, the pauper remains just as if he had never held the office. *The King v. Newmarket St. Mary*, 3 Ad. & E. 151; s. c. 4 Law J. Rep. (N. S.) M. C. 89. The vicar continued to have the same powers of appointment as in the parish church. *King v. Alston*, 12 Q. B. Rep. 971; s. c. 18 Law J. Rep. (N. S.) Q. B. 59, and Beaumont was strictly still in office. Another point here is, that the office related to two townships only, and cannot be said to have been an office notoriously exercised throughout the parish. *The King v. Amluch*, 4 B. & C. 757. He referred also to Arch. Poor Law, 6th ed. p. 584.

Hall, *Overend*, and *Pickering*, contra, were not heard.

LORD CAMPBELL, C. J. I am of opinion that a settlement was acquired in the respondent township. The office of clerk was clearly an annual office under the act, and so far therefore no objection can be supported. Then, the functions of the office are the same as those of a parish clerk, and it has been decided that the executing of the office of a parish clerk does confer a settlement. As to the notoriety of the office, no person would be more likely to be seen and known by all the neighborhood than the person officiating as clerk. With respect to the objection that the pauper was not properly appointed. If it could be shown that he really was unlawfully holding the office, I should think the settlement would not have been gained; but how can we say that, when we find that he exercised it for years with the full knowledge of the person in whom the appointment is said to be? It must, at least, be supposed that he ratified the appointment, which in this case is equal to an actual appointment by him.

PATTESON, J. Although a doubt was raised in *The King v. The Inhabitants of Stogursey*, as to whether the office of clerk was a public annual office within the 3 & 4 W. & M. c. 11, s. 6, the subsequent cases make it clear that it is such an office as will confer a settlement

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under that statute. Then, here we find that the pauper exercised the office for several years, and received the salary of it with the knowledge of the vicar, and no attempt was ever made to put him out. He was, therefore, properly in the office at the last, if not at the first, so as to acquire a settlement.

WIGHTMAN, J. The last objection is the only one that admitted of any doubt. The case of *The King v. The Inhabitants of Stogursey* is distinguishable from this. In that case there was no appointment whatever, and no ratification. The person who held the office was a mere usurper. Here, there was an appointment by the incumbent for the time being, that is, by the officiating minister of the district church, to the knowledge of the vicar, and for eight years no objection was made to the pauper's executing the office. This seems to me to remove the only objection, and to distinguish this case from *The King v. The Inhabitants of Stogursey*.

ERLE, J., concurred.

Order of sessions quashed.

REGINA v. BESSELL.¹

Easter Term, April 26, 1851.

*Copyright of Designs — 6 & 7 Vict. c. 65 — Shape and Configuration
— Combination of Parts — Conviction.*

A design was registered for a new ventilator, consisting of an oblong pane of glass fixed in a frame, which was inserted into an ordinary window frame, and was hinged at the top so as to open and admit the air by means of a screw acted upon by cords passing over its head, and having a half pane of glass fixed in the lower portion of the frame in which the ventilating frame moved, so as to prevent a downward draught. The claim of the inventor was stated to be for the general configuration and combination of the parts, none of which, if taken *per se* and apart from the purposes thereof, were new or original:—

Held, that this was not a design for the shape and configuration of an article of manufacture within the 6 & 7 Vict. c. 65, and therefore not the subject of registration.

A conviction for the infringement of such a registered design was quashed for want of jurisdiction.

THE following conviction, under the Copyright of Designs Act, 1843, dated the 1st of October, 1850, had been returned to this court upon a *certiorari*: "Be it remembered that on, &c., John Bessell, &c., is convicted before me, S. Wilson, Esq., one of the aldermen of the city of London, &c., for that he, the said J. Bessell, on the 1st day of August of 1850, within twelve calendar months last past, and during the existence of the right of W. Dixon hereinafter named to the new and original design hereinafter mentioned, and without the license, consent or agreement in writing of the said W. Dixon, then being such proprietor as hereinafter mentioned, at, &c., did, for the

¹ 20 Law J. Rep. (N. S.) M. C. 177.

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purpose of sale, unlawfully make a certain article of manufacture, to wit, a window ventilator, having reference to a purpose of utility, to wit, the ventilation of apartments in dwelling-houses, according to a certain new and original design for an article of manufacture, to wit, a window ventilator, having reference to a certain purpose of utility, to wit, the ventilation of apartments in dwelling-houses, so far as the said design was for the configuration of the said article of manufacture, and did apply the said new and original design for the purpose of sale to the making of the said article of manufacture, to wit, the said window ventilator, by him, the said J. Bessell, so made as aforesaid, and which said new and original design was and is numbered 1750, and was registered, on behalf of W. Dixon, of, &c., on the 26th of January, 1849, in pursuance of the said act, and of which said new and original design the said W. Dixon was, at the time of the committing of the said offence, to wit, on, &c., and still is, the registered proprietor, contrary to the form of the statute, &c. And I, the said alderman, do adjudge that the said J. Bessell for his said offence hath forfeited the sum of 30*l.* to the said W. Dixon," &c.

A rule *nisi* had afterwards been obtained to quash the conviction, upon affidavits verifying a copy of the registration of the design mentioned in the conviction, by which it appeared that the design registered consisted of an oblong pane of glass fixed in a metallic frame, which was inserted in an ordinary window frame, and hinged at the top so as to open to a greater or less extent by means of a straight screw, the head of which formed a pulley, over which were passed cords for the purpose of turning it, and so of either opening or shutting the ventilating pane. To prevent the downward draught of cold air consequent upon opening the ventilator, a half pane of glass was fixed in the lower portion of the frame in which the ventilating pane moved. The registration concluded thus: "The part or parts of this design which are not new or original are all the parts taken *per se*, and apart from the purposes thereof. What is claimed as new is the general configuration and combination of the parts." It was stated that the peculiar shape and configuration of these ventilators was new, and that no ventilator had before been made with such a shape or configuration. The ventilator made by the defendant was similar to that registered by Dixon, except that the pane was more nearly square than oblong, and that the screw by which it was opened or shut was curved instead of straight, but its action and effect were precisely similar.

Hindmarsh now showed cause. The only point of dispute is, whether the defendant has been guilty of any infringement. The novelty and utility of the design and the fact of registration are admitted; but it will be said that the magistrate had no jurisdiction to convict, because this invention is not a design within the 6 & 7 Vict. c. 65. One ground of objection is, that this is properly the subject of a patent as being a new manufacture; but even if that be so, it will not prevent the design being registered, and a more limited and inexpensive right acquired.

[*Patteson, J.* That question was raised, but not decided, in *Rogers v. Driver*, 20 Law J. Rep. (N. S.) Q. B. 31; s. c. 1 Eng. Rep. 269.]

That case is decisive of the present. The court there expressed an opinion that either course might be adopted. There is no doubt that what is here claimed is the shape and configuration, which is stated to be new as applied to ventilators.

[*Erle, J.* Is it not rather the combination of several matters producing a result which is here registered?]

"Configuration" is defined in Johnson's Dictionary as "the form of various parts, as they are adapted to each other," and it may still be a configuration, although there be also a combination of parts.

[*Erle, J.* Suppose a rival manufacturer were to make a ventilator acting in the same way, except that it had a circular instead of an oblong pane, would that be an infringement?]

Probably not, because all that is here claimed is a design with an oblong pane. The defendant's design is precisely similar to that of the prosecutor's, except that the screw is straight in one and curved in the other. But that must be taken to be merely a colorable variation, since the magistrate has decided as a question of fact that there has been an infringement.

T. Webster and Hunter, in support of the rule. This question turns upon what is the meaning of the words "shape or configuration" in the 6 & 7 Vict. c. 65, s. 1. There is no doubt that this ventilator is adapted for a purpose of utility, but the act is only satisfied where the shape and configuration of the design is essential to some purpose of utility. If it appeared that a greater amount of air were introduced by reason of the shape and configuration of this ventilator, the case would be altered; but this design is merely a combination of parts. The registration shows an ingenious mode of opening a window not dependent on any peculiar shape. In order to come within this act there must be a linear design which, by its shape or configuration, conduces to the utility of the article. This question has been before Vice Chancellor Knight Bruce in *Margetson v. Wright*, 2 De Gex & Sm. 420. This statute extended the 5 & 6 Vict. c. 100, which was confined to ornamental designs, to all designs having reference to purposes of utility, so far as such designs should be for the shape or configuration of the article. Here is no design contributing to a purpose of utility or dependent on the shape of the article. From beginning to end this would be a good subject for a patent, but not of registration. It is not argued that the same invention may not be the subject of a patent and of registration, but different things would be protected in each case. In the case of the brick which has been cited, a brick made in a peculiar manner would be the subject of a patent. The shape and configuration of the brick would be a design capable of registration. Here, however, nothing is sought to be protected, except the means to effect a given end, viz., the admission of air into houses.

Regina v. Besell.

PATTESON, J.¹ This registration is itself *felo de se*, for it says that the parts taken *per se* and apart from the purposes thereof are not new or original, but that the general configuration and combination of the parts is alone claimed. I do not profess to define what "shape and configuration" is, but it certainly is not the same as a combination of parts. The design contemplated by the 6 & 7 Vict. c. 65, must be for a thing which has some particular shape which is productive of utility. The word "configuration" can add very little to the idea conveyed by shape. It must be something visible to the eye. Now, there is here nothing peculiar or novel in the shape of the parts of this ventilator; but by putting them together and moving the screw by means of the cords, the window is opened in a more convenient manner than had been before done. Therefore, it is properly described as a combination of the parts, and it is not within the 6 & 7 Vict. c. 65. Consequently the magistrate had no jurisdiction, and the conviction must be quashed.

WIGHTMAN, J. This design is said to be protected by the 6 & 7 Vict. c. 65, which relates to "any new or original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article, and that whether it be for the whole of such shape or configuration, or only for a part thereof." Now, I confess I have been at a loss to see how the configuration here can have reference to any purpose of utility within the general object of the design. The prosecutor himself says he claims only the general configuration and combination of the parts. Apart from this combination there is no purpose of utility effected by the parts, and this is not, therefore, a case within the statute.

ERLE, J. The invention which is attempted to be protected is not within the meaning of the statute. It is a combination of means for the purpose of easily admitting air and avoiding a downward draught, and there is a skilful configuration to gain this end. The particular shape or configuration is wholly unimportant in producing that effect. A square or circular frame, or a straight or crooked screw, would produce exactly the same result. If the prosecutor does really show any configuration producing a useful result, then he fails in making out any infringement, because there is no doubt that the shape of the defendant's instrument varies materially from that registered, the one pane being nearly square and the other oblong, and the screw being straight in the one case and crooked in the other. What the prosecutor intended to protect was a combination producing a valuable result.

Rule absolute.

¹ LORD CAMPBELL, C. J., was sitting in the Court for Crown Cases Reserved.

Regina v. The Inhabitants of Llanelly, Brecknockshire.

REGINA v. THE INHABITANTS OF LLANELLY, BRECKNOCKSHIRE.¹

Easter Vacation, May 9, 1851.

Order of Removal—9 & 10 Vict. c. 66—Married Woman, Removability of—Absence of Husband—Residence, Disruption of.

A married woman, who had resided in the parish of L. for ten years, was removed by an order of justices. Two years before the order her husband left her and went to America. She had subsequently received letters from him, and was in daily expectation of receiving another with money for the purpose of defraying the expenses of herself and children over to America:—

Held, that she was removable, as there was no evidence that the husband intended to return to L., and that there was therefore a disruption in his residence.

ON an appeal against an order of justices, made on the 12th of July, 1850, for the removal of Margaret George and her three children from the parish of Llanelly, in the county of Brecon, to the parish of Llanelly, in the county of Carmarthen, the Court of Quarter Sessions for the county of Brecon quashed the order, subject to the opinion of this court on a case, which stated in substance as follows: The pauper, who was the wife of Thomas George, was married ten years last May, has resided within the respondent parish ever since, and has three children born since her marriage. About two years ago her husband left her in a cottage in the respondent parish, and went to America, where he then was. She had received letters from him, one only a week before the Quarter Sessions, and was in daily expectation of receiving another with money for the purpose of defraying the expenses of herself and children over to her husband in America.

The sessions were of opinion that there was not any disruption of the five years' residence; and that the years of residence were still running on in the respondent parish, therefore the order was quashed. Should this court affirm the order of sessions on the irremovability by reason of residence, the order of removal was to be quashed; but should it be of opinion that the order of sessions was wrong, then the order of removal was to be confirmed.

Pashley, in support of the order of sessions. The facts show that the pauper and her children were irremovable under the 9 & 10 Vict. c. 66, s. 1. That act was passed for the benefit and protection of the poor, and the court will give it the construction which is most favorable to their interests. The question of the removability of a married woman who has become chargeable, must be decided with reference to the legal removability of her husband, and not to his mere absence or presence in the parish. *The Queen v. St. Ebbe, Oxford*, 12 Q. B. Rep. 137; s. c. 18 Law J. Rep. (N. S.) M. C. 14; and *The Queen v. Pott Shrigley*, Ibid. 143; s. c. 18 Law J. Rep. (N. S.) M. C. 33, will be relied on by the other side; but that case is distinguishable. There a disruption of the husband's residence by transportation had taken

¹ 20 Law J. Rep. (N. S.) M. C. 179. 15 Jur. 510.

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place before the five years were completed, and it was held that as, if he had been present, he would have been removable, the wife was also removable. Here, the pauper's husband had lived in the removing parish for a longer period than five years prior to his departure for America, and had he come back before the order was made he could not have been removed. *The Queen v. Tucolnestone*, 12 Q. B. 157; s. c. 18 Law J. Rep. (N. S.) M. C. 44; and *The Queen v. Holbeck*, 20 Law J. Rep. (N. S.) M. C. 107; s. c. 2 Eng. Rep. 245, are both authorities to show that a temporary absence with an *animus revertendi* is insufficient to constitute a break in the residence so as to prevent the operation of the statute. In the present case, although the husband had been absent for two years, yet there was no indication of his having determined permanently to quit the parish. The evidence proves that he still had his domicile there. It must be presumed that the husband was constructively resident in the parish where his house and family were. *Somerville v. Somerville*, 5 Ves. 750.

Willes, contra, was not heard.

LORD CAMPBELL, C. J. I am of opinion that the order of sessions is invalid and must be quashed. The argument has failed to satisfy me that a married woman who has become chargeable may not be removed when there has been such an absence of her husband as the present case discloses. At any rate, before we could hold her to be irremovable we must be furnished with ample evidence to explain the causes of his absence, and to show that the husband intended to return to the parish. Of such intention we have no proof. The small amount of evidence that was offered leads to an entirely different conclusion, and shows that he has established himself in America and transferred his domicile thither; because after an absence of two years he writes to his wife stating that he would shortly remit funds to enable her to come over and join him. Under these circumstances, therefore, I think that he cannot be considered as resident in the parish; and as his wife could not by her own residence acquire a right of irremovability, she was properly removed.

PATTESON, J. The principle of law is clear, that a married woman and her children may be removed unless her husband is present at the time of the removal and has become irremovable. A temporary absence with an *animus revertendi*, indeed, will not, as we have recently decided in *The Queen v. Tucolnestone*, suffice to effect a break in the residence so as to include the operation of the statute; but there must be a complete disruption. Now, here the husband of the pauper had gone to America, and had been absent for two years. The presumption therefore is, that he had quitted the parish without any intention of coming back; and the burden of proving that he was still residing with his family was thrown on the respondent parish. But so far from establishing this, the evidence which they have produced shows that the very opposite was the fact. There was, therefore, a disruption of his residence within five years before

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the making of the order of removal, and the order of sessions quashing that order is consequently bad, and cannot be sustained.

WIGHTMAN, J., concurred.

ERLE, J. If the principle contended for, that the residence of the wife is that of the husband within the meaning of the act, be allowed to prevail, then it might follow that a married woman would become irremovable whose husband had left her years before and had never been in the parish. I admit that this is pushing the principle to the extreme. But I put an extreme case expressly in order to show that the argument is fallacious, and in direct contravention of the purposes for which the statute was passed.

Order of sessions quashed.

REGINA v. THE INHABITANTS OF ST. MAURICE.¹

Easter Term, April 30, 1851.

Pauper — Settlement — Stat. 8 & 9 Vict. c. 126 — Judicial Notice.

By sect. 62 of stat. 8 & 9 Vict. c. 126, two justices of the county, or two justices members of the committee of visitors of the asylum, are empowered to make an order of maintenance. By sect. 84, "county" means "county of a city."

An order for the maintenance of a lunatic purported to be made by two justices in and for the city of York:—

Held, that the court was bound to take judicial notice that the city of York was a county of a city, and therefore the order was good.

THIS was an appeal against an order adjudicating the settlement and for the future maintenance of a pauper lunatic. Both parishes were situate in the city of York. The order was made by the lord mayor and another justice for the city, and throughout the order they were described as justices of the peace in and for the city of York. York is a county of a city. The appellants objected, that as by sect. 62 of stat. 8 & 9 Vict. c. 126, a power is only given to two justices of the county, or two justices members of the committee of visitors of the asylum, to make an order for maintenance, the order in this case was bad, because it appeared to be made by two justices of the city. The recorder of York, before whom the case was tried, was of that opinion, and quashed the order, subject to a case for the opinion of the Court of Queen's Bench. The case was argued by

E. P. Price, in support of the order of sessions. By sect. 62 of stat. 8 & 9 Vict. c. 126, power to make this order is given only to two descriptions of justices, and justices of the city of York do not fulfil either description. The words of the section are satisfied without

¹ 15 Jur. 559.

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extending the power to make this order to borough justices, unless they are visitors. In Paley on Convictions, p. 24, 3d ed., it is said, "It seems consistent with principle, as the power vested in justices of the peace is of a special kind, that where any matter is referred to a particular description of justices, the authority of all others should be excluded by that express designation." By the interpretation clause, sect. 84, "county" shall mean "county of a city" and "county of a town;" but the court will not, for the purpose of giving jurisdiction, take judicial notice that York is a county of a city, nor will they presume that justices of the city have jurisdiction within the county of the city.

R. Hall, contra. By sect. 1 of stat. 6 & 7 Will. 4, c. 103, no part of the new borough is within the jurisdiction of the justices of the borough as it was before stat. 5 & 6 Will. 4, c. 76.

[*Patteson, J.* Sect. 98 of stat. 5 & 6 Will. 4, c. 76, empowered the crown to issue commissions of the peace "in and for each borough, and in and for each of the counties of cities and towns, respectively, named in schedule A." York is among those named in that schedule.]

This is not a misdescription merely, as in *Rippon v. Dawson*, 5 Bing. N. C. 206.

R. Hall, contra, was not called upon.

LORD CAMPBELL, C. J. I am of opinion that the order is sufficient. Coupling sect. 62 of stat. 8 & 9 Vict. c. 126, with the interpretation clause, sect. 84, the words "justices of the county," in sect. 62, embrace justices of the county of a city, as well as justices of a county at large; and the justices who made this order were justices of the county of the city of York, and therefore had authority to make this order under sect. 62. And though they are only described in the order as justices of the city, we are bound to take judicial notice that York is a county of a city. It is quite clear that the justices of the city of York and the justices of the county of the city are the same.

PATTESON and WIGHTMAN, JJ., concurred.

ERLE, J. In 2 Inst. 557, it is said, that the *jura regalia* and plenary jurisdiction within the county palatines of Chester, Lancaster, and Durham, are known to the king's courts, "for they take notice of all the counties of England, because they be immediate to them for direction of writs."

Order of sessions quashed.

Regina v. The Inhabitants of Priest Hutton.

REGINA v. THE INHABITANTS OF PRIEST HUTTON.¹

Easter Term, May 7, 1851.

Pauper — Order of Removal — Stat. 12 & 13 Vict. c. 103.

Sect. 5 of stat. 12 & 13 Vict. c. 103, by which the costs and expenses of the order of removal and of the maintenance of a lunatic pauper removed to an asylum, who if not a lunatic would have been exempt from removal, shall be borne by the union comprising the parish wherein the lunatic pauper was resident at the time of removal, applies to unions formed under Gilbert's Act, 22 Geo. 3, c. 83.

UPON appeal by the overseers of the township of Priest Hutton against an order of two justices, made on the 4th of May, 1850, for payment of the expenses of the maintenance of James Bland, a lunatic pauper, in the county lunatic asylum, at the October Quarter Sessions for the county of Lancaster, in 1850, the sessions confirmed the order, subject to a case. The order in question, after reciting among other things the order of a justice, dated the 10th of October, 1848, directing the removal of the said James Bland to the county lunatic asylum at Lancaster, and his removal thereto accordingly; and that the said W. B. B. and J. T., being two of the justices in and for the county of Lancaster, wherein the township of Over Kellet, from which the said James Bland was sent to the asylum, is situate, and wherein the said asylum is situate, having, on the application of a guardian of the poor of the township of Over Kellet, in a union formed under the provisions of stat. 22 Geo. 3, c. 83, commonly called Gilbert's Act, and the overseers of the poor of the said township, inquired into the last legal settlement of the said James Bland, adjudged that the township of Priest Hutton was the place of the last legal settlement of the said James Bland; and further reciting that the township of Priest Hutton was one of the townships included in the Lancaster Poor-law Union, and that complaint had been made by the said guardian and overseers of the poor of the township of Over Kellet that the said James Bland had become and was actually chargeable to that township, &c., ordered the treasurer of the guardians of the poor of the Lancaster Poor-law Union to pay to the guardians and overseers of the poor of the township of Over Kellet the sum of 20*l.* 16*s.* 8*d.*, being the amount of the sums paid by the last-mentioned guardians and overseers to the treasurer of the county lunatic asylum for the maintenance of the said James Bland during twelve months before the making of the order, and a weekly sum for his future maintenance. James Bland, the lunatic mentioned in the said order, and at the time of such order duly confined in the asylum mentioned in the said order, under the provisions of the acts relating to pauper lunatics, was lawfully settled in the township of Priest Hutton; he had, however, been continuously resident in the township of Over Kellet for more than five years before the making of the said order, and before becoming insane, and would,

¹ 15 Jur. 561.

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under the provisions of stat. 9 & 10 Vict. c. 66, have been irremovable from the township of Over Kellet as a pauper, had he continued sane. Priest Hutton is a township within the Lancaster Poor-law Union, formed under the provisions of stat. 4 & 5 Will. 4, c. 76, and Over Kellet is a township within the Caton Union, which is formed under the provisions of stat. 22 Geo. 3, c. 83, commonly called Gilbert's Act. No order had been made on the Caton Union, or the township of Over Kellet, under the 61st sect. of stat. 8 & 9 Vict. c. 126, for the payment of the charges of the lodging, maintenance, &c., of the said James Bland in the asylum to which he was removed. The several allegations in the order, showing jurisdiction in the justices to make such order, are true. It was contended by the appellant township, that by the joint operation of the 9 & 10 Vict. c. 66, of the 3d section of the 11 & 12 Vict. c. 110, and the 4th section of the 12 & 13 Vict. c. 103, the appellant township is discharged from any liability to the expenses of the removal of the lunatic pauper to the asylum, or his residence there; and that the jurisdiction of the justices to make the order in question is thereby taken away. It was further contended by the appellant township, that they were also discharged from such liability, and the jurisdiction of the justices to make such order taken away, by the 5th section of the 12 & 13 Vict. c. 103, although the respondent township is in a Gilbert Union. The sessions confirmed the order. The question for the opinion of this court is, whether the jurisdiction of the justices to make the said order is taken away by the operation of the said statutes, or any of them. The order to be set aside or confirmed, according to the judgment of the court on these points.

R. Hall, in support of the order of sessions. The principal question is, whether stat. 12 & 13 Vict. c. 103, which throws upon unions the maintenance of pauper lunatics, applies to unions formed under Gilbert's Act, 22 Geo. 3, c. 83. By section 5, the costs and expenses incurred since the 25th March, 1849, in and after the obtaining an order of justices for the removal and maintenance of a lunatic pauper to an asylum, and who, if not a lunatic, would have been exempt from removal by reason of some provision in stat. 9 & 10 Vict. c. 66, shall be borne by the common fund of the union comprising the parish wherein such pauper lunatic was resident at the time when he was removed to the asylum. That section is supplemental to stat. 11 & 12 Vict. c. 110, which refers only to unions formed under stat. 4 & 5 Will. 4, c. 76. By sect. 1 of stat. 11 & 12 Vict. c. 110, after reciting stat. 4 & 5 Will. 4, c. 76, the cost of the relief to be given to any poor person chargeable or becoming chargeable in any union formed or to be formed under the provisions of the said act, shall be chargeable to the common fund of such union; and by sect. 3, all the costs incurred in the relief of any poor person, who, not being settled in the parish where he resides, shall, by reason of some provision of stat. 9 & 10 Vict. c. 66, be exempted from the liability to be removed from the parish where he resides, shall, where the said parish shall be comprised in any such union as aforesaid, be charged to the

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common fund of such union so long as such person shall continue to be so exempted. If, therefore, sect. 5 of stat. 12 & 13 Vict. c. 103, is held to apply to unions formed under Gilbert's Act, there will be a different law for the maintenance of irremovable paupers who are lunatic, and irremovable paupers who are not lunatic. That section was introduced in consequence of the decision in *Reg. v. Leaden Roothing*, 12 Q. B. 181; 13 Jur. 534. Further, sect. 5 applies only to costs and expenses incurred since the 25th of March, 1849: the order of removal in this case was obtained in October, 1848; and therefore the expenses incurred in and about obtaining that order are not within that section.

Pashley, contra. The order in question of the 4th of May, 1850, does not order the repayment of expenses incurred before the 4th of May, 1849. *The Overseers of Wigton v. The Overseers of Snaith*, 15 Jur. 246, decided that sect. 5 of stat. 12 & 13 Vict. c. 103, included the expenses of the maintenance of the lunatic pauper as well as those of the order of removal; and by the interpretation clause, sect. 109 of stat. 4 & 5 Will. 4, c. 76, which, by sect. 21 of stat. 12 & 13 Vict. c. 103, is extended to that act, "the word 'union' shall be construed to include any number of parishes united for any purpose whatever under the provisions of this act, or incorporated under stat. 22 Geo. 3, c. 83, or incorporated for the relief or maintenance of the poor under any local act." The foundation of the present order is in stat. 10 & 11 Vict. c. 110, which has much more general words.

LORD CAMPBELL, C. J. The question is, whether a union under Gilbert's Act, 22 Geo. 3, c. 83, is a union within the meaning of sect. 5 of stat. 12 & 13 Vict. c. 103. It clearly is so, reading the words according to their natural and grammatical construction; and instead of there being any thing to rebut that construction, the interpretation clause, sect. 109 of stat. 4 & 5 Will. 4, c. 76, which I think must be considered as applying to all the later statutes in *pari materia*, expressly enacts that the word "union" shall be construed to include any number of parishes incorporated under stat. 22 Geo. 3, c. 83: that removes all doubt.

PATTESON, WIGHTMAN, and ERLE, JJ., concurred.

Order of sessions quashed.

HOPKINS v. DOGGETT.

HOPKINS v. DOGGETT.¹

Trinity Term, June 12, 1851

Nul Tiel Record, Plea of — Practice with Reference to Production of Record — What sufficient Notice.

In the case of a plaintiff giving notice to a defendant of his intention to produce the record in court, on a plea of *nul tiel* record, it is sufficient to give two days' notice.

Semble, in the event of the plaintiff giving a defendant notice to produce it, four days should be given.

THIS was an application for a rule calling upon the plaintiff to show cause why the rule for judgment made in this cause, and the judgment, if signed, should not be set aside, with costs, and why in the mean time all proceedings should not be stayed. It appeared that an action had been brought by the plaintiff in the Tolzey Court of Bristol, upon which he recovered a verdict. The plaintiff then brought an action upon the judgment in this court. The defendant pleaded *nul tiel* record; upon which issue was joined on the 10th of May. The plaintiff, on the 8th of June, gave the defendant notice in writing that he would, on the 10th of June, produce the record in court. Upon the 10th of June, the day appointed, the defendant did not appear, when the plaintiff produced the record, and obtained a rule for judgment.

Pearson, in support of the application. There is a manifest error on the part of the plaintiff's proceedings, which render them irregular. Instead of giving four days' notice, which he ought to have done, the plaintiff only gave two. In 2 Chit. Arch. Prac. 838, in reference to proceedings upon *nul tiel* record, it is stated that the issue is made up and delivered as in ordinary cases, and in the same form as an issue triable by the county, excepting the conclusion. It also goes on to state, that the rule is a four-day rule. This being, in fact, like a notice of trial in other cases, the same strictness should be observed with regard to the time of giving it. It is submitted, therefore, that as the plaintiff has omitted to comply with the rule in this respect, the proceedings must be set aside.

WIGHTMAN, J. If this had been the case of a plaintiff requiring the defendant to produce the record, then it must have been a four-day rule. In this case the plaintiff is to produce it. Nor do I think this at all analogous to a notice of trial. In the case of a trial by jury, the defendant may have a case to prepare and witnesses to *subpœna*, which requires some little time. The master informs me, that in practice forty-eight hours are deemed sufficient. The rule must, therefore, be refused.

Rule refused.

¹ 15 Jur. 563.

Regina v. Scaife, Rooke, & Smith.

REGINA v. SCAIFE, ROOKE, & SMITH.¹

Trinity Term, June 2, 1851.

Evidence — Deposition of absent Witness — When admissible.

The deposition of a witness taken before a justice in pursuance of sect. 17 of stat. 11 & 12 Vict. c. 42, is not admissible in evidence against a prisoner, upon proof that he is kept out of the way by means or procurement of some other person than the prisoner.

Therefore, where, upon the trial of an indictment against two prisoners for a larceny, it appeared that a witness was kept out of the way by the contrivance of one of the prisoners only: —

Held, that the deposition, though admissible in evidence, should be applied only to the case against him.

INDICTMENT against the defendants for felony, found at the Quarter Sessions for the borough of Kingston upon Hull, and removed by *certiorari*. On the trial, before Cresswell, J., at the Spring assizes for the county of York, the deposition of Ann Garnet, regularly taken before the magistrates, in the mode prescribed by sect. 17 of stat. 11 & 12 Vict. c. 42, upon the committal of the prisoners to take their trial at the Quarter Sessions, was tendered in evidence, under the following circumstances: Garnet had been put into lodgings by the police, for the purpose of securing her attendance as a witness on the trial. Persons had called upon her, and money had been given to her, and at length she disappeared, and could not be found. It was objected, that the deposition was not receivable, but the learned judge received it, on the ground that the witness had been kept out of the way by the contrivance of the prisoner Smith. Two of the prisoners, Scaife and Rooke, were found guilty, and the prisoner Smith was acquitted. In the following Easter term a rule *nisi* for a new trial was obtained on behalf of Scaife and Rooke, on the ground of the improper reception of evidence; against which

Hunter now showed cause. First, at common law, if a witness is not to be found after diligent search, the deposition which he has made before a magistrate is admissible as secondary evidence. In the King's Bench, 21 Jac. 1; Godb. 326, "It was further said by the court, that if the party cannot find a witness, then he is, as it were, dead unto him, and his deposition in an English court in a cause betwixt the same parties, plaintiff and defendant, may be allowed to be read to the jury, so as the party make oath that he did his endeavor to find his witness, but that he could not see him or hear of him." A deposition before a magistrate on a primary inquiry is taken in the presence of the prisoner, and he has full opportunity of cross examining the witness. There is no ground for any distinction between civil and criminal proceedings in this respect. Tayl. Ev. 332. "But a deposition shall not be evidence at law, except where the witness is dead. 1 Salk. 286. Or, cannot attend by reason of sickness, or can-

¹ 15 Jur. 607.

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not be found. Show. 363." Com. Dig., "Testmoigne," C. 4. [He also cited Bull. N. P. 238, a.] The sixth resolution of the judges in *Rex v. Lord Morley*, 6 How. St. Tr. 770, 771, is, "That if a witness, who was examined by the coroner, be absent, and oath is made that they have used all their endeavors to find him, and cannot find him, that is not sufficient to authorize the reading of such examination;" but in proceedings before the coroner the prisoner is not present. Further, that resolution was in favor of the prisoner, because at that time witnesses for the prisoner could not be examined. In *Rex v. Hagan*, 8 Car. & P. 167, which was an indictment for a felony, a deposition of a witness for the prosecution, who had gone to sea, was read in evidence on the part of the prisoner, with consent on the part of the prosecutor. Secondly, the deposition of a witness who has been searched for and cannot be found, and is kept away by the means or procurement of the opposite party, or of the prisoner, is inadmissible. Fifth resolution of the judges in *Rex v. Lord Morley*, 6 How. St. Tr. 770, 771; *Rex v. Harrison*, 12 How. St. Tr. 834, 851, which was an indictment for murder, A. D. 1692, 4 Will. & M.

[*Lord Campbell*, C. J. The cases in the State Trials, as to the admissibility of evidence before the revolution, are entitled to very little weight.]

[He also cited *Rex v. Guttridge*, 9 Car. & P. 473; and *Green v. Gatewick*, Bull. N. P. 242, b.]

Dearsly, contra. There is a distinction between civil and criminal cases as to this point, because in the former a bill of exceptions may be tendered, whereas in criminal cases it cannot. If a witness had made a false accusation against a person, he would purposely abscond, from a consciousness of the falsehood of his former statement, and it would be most unjust to receive his depositions against the prisoner, as is suggested in Tayl. Ev. 333. If the deposition was receivable at common law, what was the necessity for passing sect. 17 of stat. 11 & 12 Vict. c. 42?

[*Lord Campbell*, C. J. That enactment specifies certain preliminary conditions on which the deposition may be admitted, such as the signature of the justices by or before whom it purports to have been taken.]

In 2 Russ. Cr. 889, ed. by Greaves, the only cases in which the deposition is mentioned as admissible are where the witness is dead, or where he has been kept away by the practices of the prisoner. At any rate, the deposition was only evidence for the purpose of convicting the prisoner who was proved to have contrived the absence of the witness; whereas, the learned judge, in summing up the case to the jury, treated the deposition as evidence against all the prisoners.

LORD CAMPBELL, C. J. I am of opinion that the rule should be made absolute for a new trial. There being evidence that the defendant Smith had resorted to a contrivance to keep the witness out of the way, the deposition would be admissible against him; but not against the other defendants, there being no evidence to connect them with

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the contrivance of their co-defendant. The learned judge, in summing up to the jury, appears to have made no distinction as to the duty of the jury to weigh the deposition of the absent witness against the one defendant, and not against the others. That raises the question whether such a deposition is admissible against a prisoner, without proof that the deponent is kept away by his contrivance. No case has gone so far, and I should be afraid to make a precedent for a rule which would deprive a prisoner of the advantage of having a witness against him examined before the jury, with full liberty to cross examine him upon all matters material to his defence.

PATTESON, J. The deposition of the absent witness would be admissible as against the defendant Smith, by whose contrivance she was kept out of the way, but it ought to be applied only to the case against him.

COLERIDGE, J. Before the recent act, 11 & 12 Vict. c. 42, if a witness was absent, either by reason of death, or the procurement of the prisoner, the deposition of the witness was receivable in evidence against him. All other absences of a witness were within one category, and were not receivable. Sect. 17 of the recent act took one other case — viz., that of illness, such as made the witness not able to travel — out of the one category, and put it into the other. But that enactment was quite unnecessary — it is only a legislative declaration. Absence from illness is an innocent absence, and clearly within the rule which renders depositions admissible.

ERLE, J. I am of opinion, for the reasons already given, that the deposition was not admissible merely on account of the absence of the witness.

Rule absolute.

*In re JONES & Wife v. CURRY & Wife.*¹

Trinity Term, June 17, 1851.

County Court — Prohibition — 9 & 10 Vict. c. 95, s. 58 — Malicious Prosecution.

A summons issued from the County Court of S. in the following terms: "For that your wife assaulted the wife of the plaintiff on, &c., and maliciously caused the plaintiff to be wrongfully charged with stealing, &c., and to be detained in custody, &c., whereby the plaintiff was put to expenses in producing witnesses and other persons in clearing the plaintiff's said wife from the said malicious assault and charge," &c.; particulars were annexed in terms similar to the summons, claiming for damages a sum of 10*l.* : —

Held, that this was an action for a malicious prosecution, and that by the 9 & 10 Vict. c. 95, s. 58, the county court had no jurisdiction.

In this case a rule had been obtained calling upon the plaintiffs to show cause why a writ of prohibition should not issue to prohibit

¹ 15 Jur. 610.

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the judge, high bailiff, and other officers of the Southwark County Court of Surrey from further proceeding in a plaint or action in that court between the plaintiffs and defendants, and from carrying into execution or otherwise giving effect to the judgment therein of that court. A plaint had been entered in the above court, and the following summons issued upon it:—

“ In the Southwark County Court of Surrey.

*“ John Jones and Mary Ann Jones his wife
against*

“ Andrew Curry and Cecilia Curry his wife.

“ You are hereby summoned to appear at a county court to be holden, &c., to answer the above-named plaintiffs in an action for tort, for that your wife assaulted the wife of the plaintiff on the 25th of March, 1851, and maliciously caused the plaintiff to be wrongfully charged with stealing a shawl, and conveyed from her house through the streets to the station, and caused her to be locked up and detained in custody at and in the police cell, in the borough of Southwark, from eight o'clock at night of the said 25th of March to the sitting of the police court of the 26th; and further caused the plaintiff Mary Ann, and another surety, to be bound in recognizances for the due appearance of the wife of the said plaintiff at the said police court on Tuesday, the 15th day of April, 1851, to await any indictment which might be found against the wife of the plaintiff; whereby the plaintiff was put to expenses in producing witnesses and other persons on clearing the plaintiff's said wife from the said malicious assault and charge, to the plaintiff's damage” &c.

The particulars annexed were in these terms: “ For that the wife of the defendant assaulted the wife of the plaintiff on the 25th of March, 1851, and maliciously caused her to be wrongfully charged with stealing a shawl, and conveyed from her house through the streets to the station, and caused her to be locked up and detained in custody at and in the police cell, in the borough of Southwark, from eight o'clock at night of the said 25th of March to the sitting of the police court of the 26th; and further caused the plaintiff Mary Ann, and another surety, to be bound in recognizances for the due appearance of the wife of the said plaintiff at the said police court on Tuesday, the 15th day of April, 1851, to await any indictment which might be found against the wife of the plaintiff; whereby the plaintiff was put to expenses in producing witnesses and other persons on clearing the plaintiff's said wife from the said malicious assault and charge, to the plaintiff's damage of 10*l*.” Upon the hearing of the plaint, it was objected on the part of the defendants, that the judge had no jurisdiction to try the cause, upon the ground that this was an action for a malicious prosecution, and consequently within the proviso of the 58th section of the 9 & 10 Vict. c. 95.¹ The judge,

¹ The following is the proviso of the section referred to: “ Provided always, that the

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however, decided that he had jurisdiction, and proceeded to hear and determine the plaint, giving judgment for the plaintiffs for the amount of damages sought to be recovered. It also appeared that the giving into custody of the plaintiff Mary Ann Jones, by the defendant Cecilia Curry, was the only assault proved and found by the judge to be committed.

T. Jones now showed cause. The only question was, whether the judge, in the matter before him, proceeded as on a plaint for a malicious prosecution. The terms of this plaint would constitute a good declaration in trespass. It was stated that the wife of one party assaulted the wife of the other; and the words "caused her to be conveyed from her house through the streets to the station, and caused her to be locked up and detained in custody at and in the police cell," were the ordinary terms of a declaration in trespass for false imprisonment. The judge had clearly jurisdiction over the assault, and a prohibition will not go where a judge has jurisdiction over any part of the complaint, but only where his jurisdiction is entirely excluded. If the defendants had wished to show that this was not what in point of law is deemed an assault, they ought to have brought before the court facts which would have left no reasonable doubt upon the subject. They cannot, however, say that there was no assault—an assault was charged, proved, and judgment given in respect of it. In order to interfere with any tribunal, and prohibit it from going into a case, it must be clearly shown that the judge has no jurisdiction in the matter; but it was perfectly consistent with any thing alleged in this case, that the whole charge may have been one of an assault; and though there may have been circumstances of malice, yet those circumstances were only such as ought to have gone in aggravation of the damages.

Massey Dawson, in support of the rule.

[*Wightman, J.* It is said that there is only an assault charged as a substantive offence, and that the other matters might be taken in aggravation of damages.]

We show that the only assault proved was the giving into custody; that is not disputed. The judge therefore adjudicated upon all the other circumstances involved in and surrounding that act. To give the county courts jurisdiction there must be an actual assault, and not, as in this case, a merely constructive one, by giving a person into custody. The plaint might be taken to be either in trespass or case, but this was attributable to the method of pleading adopted in these inferior courts, and was an instance of the confusion created by departing from old and well-established rules. Again: by the practice

court shall not have cognizance of any action or ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction, or breach of promise of marriage."

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of the county courts, a plaintiff is restricted to his particulars of demand; and, looking at the particulars in this case, it clearly appeared that the act for which damages were claimed was the maliciously causing the wife of the plaintiff to be wrongfully charged with stealing. It can only be gathered from the summons and particulars, taken together, that the action was one for a malicious prosecution; and in the absence of any express rule to guide the court, in its construction of those documents, the old rule would be adopted, and the pleadings would be construed most strongly against the party pleading.

WIGHTMAN, J. The only question in this case is, whether a plaintiff in a county court is wholly or in part a plaintiff for a malicious prosecution. The summons states that the wife of the defendant assaulted the wife of the plaintiff, and maliciously caused her to be charged with stealing a shawl, &c., whereby the plaintiff was put to expenses in clearing the plaintiff's wife from the said malicious assault and charge. Now, it is contended that the words "assaulted the wife of the plaintiff" may be taken to mean something more than a constructive assault, and that under that charge of assault the county court judge, without exceeding his jurisdiction, might have inquired into all the circumstances, although they may seem to constitute a malicious prosecution, and that he might give damages for those circumstances under the simple charge of assault. There is no ground, however, upon which such an argument can be supported. The charge of assault, *simpliciter*, appears to be an introduction to what follows. The particulars of demand are also brought before me, and there again the words of the summons are repeated, and then one sum of 10*l.* is claimed for all the damages sustained by the assault and malicious charge; and it appears that was the whole amount the judge awarded. The plaintiffs do not claim so much for the assault and so much for the circumstances attending the assault, but put it altogether in one sum. The objection was taken before judgment was given. The judge, however, proceeded to hear and determine the plaintiff. No other assault was before the judge but that which was a constructive assault, viz., "the giving into custody." The plaintiffs had not denied by an affidavit that this was a malicious prosecution; but upon the whole case, as represented to the court by the affidavit of the defendants, and upon looking at the summons and particulars of demand, it does sufficiently appear that it was a case of malicious prosecution. A prohibition will, therefore, be granted, on the ground that this is one of the cases excepted from the jurisdiction of the county courts by the 58th section of the statute.

Rule absolute

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER.

FROM AND AFTER HILARY TERM, 14 VICT., A. D. 1851.

JONES *v.* HUTCHINSON.¹

Hilary Term, January 14, 1851.

Variance — Amendment — 3 & 4 Will. 4, c. 42, s. 23.

A declaration in *assumpsit* alleged that in consideration that the plaintiff, at the request of the defendant, would make for him such a number of aerometers as the defendant should from time to time require, and deliver the same when completed, the defendant would accept the same and pay for them. Breach, by not accepting part completed according to order, and discharging the plaintiff from continuing the making of other part, commenced to be made according to order.

It was proved that the original contract was an order to make 2000 aerometers, that 300 had been accepted, and the rest were in course of being made when the defendant discharged the plaintiff from completing them.

The judge at *nisi prius* having allowed the declaration to be amended, the court refused to grant a new trial.

The parties having agreed to the terms of the amendment, and that it should be made after the trial was over on the same day, the amendment was not actually made until eight days after the trial, but in the terms agreed on, and before the following term:—

Held no ground for a new trial.

The defendant's affidavits alleged that if the declaration had originally contained an allegation of an order for 2000 aerometers, he would have been prepared to show that such an order was absurd and impossible:—

Held insufficient to show that the defendant had been prejudiced in his defence, in the absence of any allegation that 2000 aerometers had not in fact been ordered.

ASSUMPSIT. The declaration stated, that in consideration that the plaintiff at the request of the defendant would make for him certain chattels, to wit, such a number of aerometers as the defendant should from time to time require to be made, for reasonable prices, and would deliver the same to the defendant when completed, and when

¹ 20 Law J. Rep. (N. S.) C. P. 114.

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required by the defendant, the defendant promised to accept the same when so made, and pay the plaintiff the said prices; that afterwards the defendant required the plaintiff to make divers, to wit, 1000 aerometers in pursuance of the said promise; that the plaintiff, within a reasonable time, did make and complete part of the said aerometers so ordered, to wit, 500 thereof, and was ready and willing, within a reasonable time, to deliver the same, and then in part made the remainder, to wit, 500 others of the said aerometers so ordered as aforesaid, and was ready and willing to complete the same, of all which the defendant had notice; yet the defendant, not regarding his said promise, did not nor would accept the aerometers so made, nor pay for the same or any part thereof, but before a reasonable time had elapsed for the plaintiff to complete the remainder, refused to accept or pay for the aerometers made or any of them, or to accept or pay for any aerometers to be made by the plaintiff, and required the plaintiff to cease from making the residue of the aerometers then in course of being made, and discharged him from continuing the making thereof. Damage to the plaintiff in loss of profits, and in labor and materials bestowed upon the making of the aerometers.

Plea — Non assumpsit.

At the trial, before Jervis, C. J., at the sittings in Middlesex after Michaelmas term, the 5th of December, 1850, it appeared that the defendant gave the plaintiff an order to make 2000 aerometers, to be delivered when required within a reasonable time; that the plaintiff completed 300, and commenced the remaining 1700; that the defendant accepted the 300 which were completed and paid for them, but refused to accept or pay for the remainder before the plaintiff could have completed them, and discharged the plaintiff from completing them.

The defence set up by the defendant at the trial was, that the contract was not made between the plaintiff and the defendant, but between the plaintiff and a gas company, for whom the defendant was acting as agent. This defence, however, failed. Upon the close of the plaintiff's case, it was objected for the defendant, that there was a variance between the declaration and the proof. The plaintiff's counsel asked for leave to amend. This was opposed by the counsel for the defendant, on the ground that the case would be entirely altered by it, the contract, as alleged in the declaration, being one which would be required to be in writing; and that this might be the defendant's sole ground for defending the action. The learned judge, however, upon the defendant's counsel refusing to make an affidavit that he came to defend upon that ground, allowed the declaration to be amended, by stating a contract for 2000 aerometers and an acceptance of 300, and suggested that the amendment should be drawn up the same day, after the cause was over; which was agreed to. The jury found for the plaintiff, damages 150*l*.

Montagu Chambers now moved for a new trial upon the above facts, and upon affidavits stating that the amendment was not, in fact, made until eight days after the trial, and that if it had been

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supposed by the defendant that an order for 2000 aerometers could have been proved under the declaration, or that, if the declaration had originally set up such an order, he would have been furnished with evidence to show that such an order would not have been given by any sane person, and was quite impossible, for reasons stated in the affidavit.

First, the contract alleged in the declaration was one of an entirely different nature from that proved at the trial. No part delivery was contemplated; and a contract in writing must have been proved to entitle the plaintiff to a verdict. The variance was, therefore, in a particular material to the merits, and the amendment one by which the defendant would be prejudiced in the conduct of his defence. It states an entirely new case. The words of the stat. 3 & 4 Will. 4, c. 42, s. 23, show that such a case as this is not contemplated as a case for amendment: "It shall be lawful for any judge sitting at *nisi prius* to cause the record, when any variance shall appear between the proof and the recital or setting forth on the record, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended."

[*Maule, J.* The merits in this case were, whether the defendant had improperly refused to accept some aerometers which the plaintiff had agreed to make for him. The words of the statute, "in any particular in the judgment of such judge not material to the merits," show clearly that the judge at *nisi prius* is to exercise a discretion upon the materials then before him.]

Secondly, the amendment was not made "forthwith," but several days after the trial, and there was no consent to postponing the amendment for several days.

[*Jervis, C. J.* The amendment is precisely what the parties agreed to have made.]

Thirdly, the affidavits show that the defendant was, in fact, prejudiced in his defence. They show that he could have negatived the contract for 2000 aerometers, as alleged in the amended declaration.

[*Jervis, C. J.* The defence upon the merits was, that the defendant was not liable, whatever the contract was, but the gas company.

Maule, J. The affidavit does not deny that an order for 2000 aerometers was in fact given.]

*Per curiam.*¹

Rule refused.

¹ JERVIS, C. J., MAULE, CRESSWELL, and WILLIAMS, JJ.

Ratt v. Parkinson & another.

RATT v. PARKINSON & another.¹

Easter Term, May 5, 1851.

Order of Justices — Warrant — Jurisdiction — Trespass or Case — Church Rate — Distress — Informality in Warrant — Exceeding Jurisdiction — 11 & 12 Vict. c. 43, s. 14 and 17; and c. 44, s. 1 and 2 — 53 Geo. 3, c. 127, s. 7.

By sect. 1 of 11 & 12 Vict. c. 44, "Every action to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction, shall be an action on the case." By sect. 7 of 53 Geo. 3, c. 127, two justices are empowered "by order under their hands and seals" to direct the payment of money due for church rates, with costs; and upon refusal of parties "to pay according to such order" by warrant under hand and seal to levy the rate and costs by distress. By sect. 14 of 11 & 12 Vict. c. 43, it is enacted, "That if justices convict or make an order against a defendant, a minute thereof shall be then made, and the conviction or order shall be afterwards drawn up in proper form, under their hands and seals." By sect. 17, "In all cases whereby any act authority is given to levy any sum upon any person's goods by distress for not obeying any order of justices, the defendant shall be served with a minute of such order before any warrant of distress shall issue in that behalf."

The plaintiff having been rated to a church rate and refused to pay, a complaint was made before justices, and duly heard, and on the 6th of May a verbal order was made for payment by the plaintiff of the amount of the rate and costs. This order was not formally drawn up till some days afterwards. On the 7th a minute of the order was served upon the plaintiff, who refused to pay. After such refusal the order was formally drawn up, dated the 6th of May, and a warrant issued by the defendants, dated the same day, which was not executed until October, when a cart of the plaintiff was seized for the distress. It did not appear whether the warrant was drawn up before or after the order dated the 6th of May, nor did it recite the order.

The plaintiff having brought trespass for the seizure:—

Held, that it was not necessary before issuing the warrant that an order should have been formally drawn up under hand and seal, but that the pronouncing of the order on the 6th and the service of the minute of the order on the 7th were sufficient to justify the issuing of the warrant; and that the non-recital of the order in the warrant, and the fact of the date of the warrant being the same as that of the order, and the neglect to show in the warrant that it had issued subsequently to the disobedience of the order, being all only matters of form, the defendants were entitled to the protection of sect. 1 of 11 & 12 Vict. c. 44.

Seem, (*per* Jervis, C. J.,) the words "exceeding his jurisdiction" in sect. 2 of 11 & 12 Vict. c. 44, mean doing something which the justice could by no possibility have a legal right to do.

TRESPASS for taking and converting a cart of the plaintiffs.

Plea — Not guilty by statute.

At the trial, before Erle, J., at the Spring assizes for Bucks, it appeared that the church-wardens and overseers of the parish of Linsdale had made a church rate on the 7th of February, 1849, under the powers of 5 Geo. 4, c. 26, for the repayment of a loan from the Public Works Commissioners. By sect. 2 of that act, it is enacted, "That it shall be lawful for any church-warden or overseer of or in any parish in which any rates shall be made under the provisions of this act, to collect, demand, and receive, sue for, levy and recover all such rates by all such ways and means as any church rates may by law be collected, &c., as fully and effectually as if all powers, authorities, provisions, penalties, and forfeitures relating to the col-

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lecting, &c., of any church rates, or relating to any refusal to pay any like rates, were specially repeated and enacted in this act." The rate having been made and allowed, and notice thereof having been given upon the church door, the plaintiff, who was rated at 3s. 6d., refused to pay. On the 27th of March, 1850, the parish officers laid a complaint against the plaintiff for non-payment of the rate, and on the same day a summons was issued commanding the plaintiff to appear before justices to answer the complaint on the 1st of April. The complaint was partially heard on the 1st of April, but adjourned at the plaintiff's request to the 6th of May, when the defendants decided that the 3s. 6d. was due from the plaintiff, and ordered him to pay that sum with costs to the church-wardens and overseers. A minute of this order was made on the 6th of May, and a copy of it served upon the plaintiff on the following day, when a demand of payment was made. No formal order was drawn up until some time afterwards, but at the Midsummer sessions, in June, an order was filed with the minute, and was dated the 6th of May, which was also the date of the warrant of distress. The warrant was in fact drawn up after the service of the copy minute and the demand of payment, and was not executed until the 1st of October following, when the seizure complained of in this action took place. The warrant did not recite the order, but stated the plaintiff's refusal to pay the rate in question, and the complaint and appearance of the plaintiff, and that the rate was still due, and went on to command a distress of the plaintiff's goods and chattels for the 3s. 6d. and costs of obtaining the warrant.

The learned judge was of opinion that, the defendants having a general jurisdiction in the matter of the rate, under 5 Geo. 4, c. 36, s. 2, and 53 Geo. 3, c. 127, s. 7, when the complaint was laid, and the objections to their proceedings being merely upon matters of form, they were within the provisions of 11 & 12 Vict. c. 44, s. 1, and not liable in trespass, and nonsuited the plaintiff, giving him leave to move to enter a verdict for 8*l*, which was found to be the value of the cart seized.

A rule having been obtained accordingly, —

Keane and *D. Power* now showed cause. The defendants in this case were acting as magistrates in a matter over which they had a general jurisdiction, and if any irregularity has been committed, they are within the 1st section of 11 & 12 Vict. c. 44, and the action should have been an action upon the case. The words of that section are, "That every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for tort." By sect. 2 of 5 Geo. 4, c. 36, all the provisions of the law relating to church rates in general are made applicable to church rates such as that for which the distress was here made. By 53 Geo. 3, c. 127, s. 7, after providing for the mode of summoning persons refusing to pay church rates before two justices, such justices are empowered

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"by order under their hands and seals to direct the payment of what is due and payable in respect to such rate, with costs; and upon refusal or neglect of such party to pay according to such order, it shall and may be lawful for any one of such justices by warrant under his hand and seal to levy the money thereby ordered to be paid, together with the amount of such costs and charges, by distress and sale of the goods of such offender." This enactment is to be read together with 11 & 12 Vict. c. 43, s. 14 and 17. By sect. 14 of that act the mode in which justices are to proceed on the hearing of informations or complaints is pointed out, and it is then enacted as follows: "And if he or they convict or make an order against the defendant, a minute or memorandum thereof shall be then made, for which no fee shall be paid, and the conviction or order shall *afterwards* be drawn up by the said justice or justices in proper form under his or their hand and seal or hands and seals, and he or they shall cause the same to be lodged with the clerk of the peace, to be by him filed among the records of the General Quarter Sessions of the Peace." By sect. 17, it is enacted, that "in all cases where by any act of Parliament authority is given to commit a person to prison, or to levy any sum upon his goods or chattels by distress for not obeying any order of a justice or justices, the defendant shall be served with a copy of the minute of such order before any warrant of commitment or of distress shall issue in that behalf, and such order or minute shall not form any part of such warrant of commitment or of distress."

[*Jervis*, C. J. The manifest object of sect. 14 was to give time to draw up the order formally afterwards.]

And the notice of his duty to pay which the act requires, is the service of the copy minute under sect. 17. It was not, therefore, the duty of the defendants to wait for a formal drawing up of the order before they issued their warrant of distress. The warrant, then, having been duly issued, the defendants, in execution of their duty, and acting under the warrant, committed the act of which the plaintiff complains. *Leary v. Patrick*, 19 Law J. Rep. (N. S.) M. C. 211, is distinguishable; for there the warrant was to levy costs, in which respect it was not authorized by the conviction, and the costs were levied; there was, therefore, in that case an excess of jurisdiction. In *Barton v. Bricknell*, 20 Law J. Rep. (N. S.) M. C. 1; s. c. 1 Eng. Rep. 298, where a justice convicted the plaintiff in a penalty, and adjudged that it should be levied by distress and sale, but exceeded his jurisdiction in ordering the plaintiff in default of payment to be set in the stocks, which was not done, but the plaintiff's goods were seized, and the penalty levied under a distress; it was held, that the justice was entitled to the protection of sect. 1, and that an action of trespass could not be maintained. That was on the ground that there was no excess of jurisdiction in the act for which the action was brought, which is the case here.

[*Williams*, J. One objection is, that the refusal or neglect to pay must intervene between the making of the order and the issuing of the warrant, and here they appear on the face of them to have been made on the same day.]

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That is a mere informality, and is precisely the case to which the statute is intended to apply. But the provision in sect. 2 of the 11 & 12 Vict. c. 43, also applies. That section enacts, "That for any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby or by any act done under any conviction or order made or warrant issued by such justice in any such matter may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this act, without making any allegation in his declaration that the act complained of was done maliciously and without reasonable and probable cause." Assuming that this was a case to which these words apply, the proviso which follows applies also: "Provided, nevertheless, that no such action shall be brought for any thing done under such conviction or order, until after such conviction shall have been quashed, either upon appeal or upon application to her majesty's Court of Queen's Bench." Though the word "order" is omitted in the second branch of the proviso, it must be inserted to give effect to the proviso, as the words "in and about the" were inserted in order to give effect to the real meaning of the legislature in *The Queen v. Wigton*, 20 Law J. Rep. (N. S.) M. C. 110; s. c. 2 Eng. Rep. 248. Now, in this case there was a valid order subsisting not appealed against, under which the defendants acted; the proviso therefore applies, and the action cannot be maintained.

Byles, Serj., *O'Malley*, and *Worlledge*, in support of the rule. First, the warrant was not issued within the jurisdiction of the defendants, because it was not founded upon a refusal to pay according to an order under the hands and seals of the justices as required by sect. 7 of the 53 Geo. 3, c. 127. There must have been a refusal to pay "according to such order;" and unless the 7th section of the 53 Geo. 3 is to be considered as repealed by the 11 & 12 Vict. c. 43, s. 14 and 17, it is impossible to say that the justices had jurisdiction to issue this warrant.

[*Cresswell*, J. You say that the order and the warrant purport to have been made on the same day, and it does not appear which was made first, and that therefore there does not appear to have been any disobedience of the order so as to give jurisdiction for the warrant?]

Yes; no disobedience of an order under hand and seal. Until it is under hand and seal, it is no order within the meaning of 53 Geo. 3, c. 127. *The King v. Cheshire*, 5 B. & Ad. 439; s. c. 2 Law J. Rep. (N. S.) M. C. 95. How could the order as it existed on the 6th of May have been appealed against? It was then a mere verbal order. It is clear, therefore, that but for the 11 & 12 Vict. c. 43, this warrant was premature. But it is said that that act, by sects. 14 and 17, substitutes the service of the copy minute for that of an order under hand and seal. This is not, however, the true effect of the act. The provision in sect. 17, regarding the service of the copy minute, is cumulative, and does not dispense with the provisions in sect. 7 of the 53 Geo. 3, c. 127, which require the warrant to be founded on an order under hand and seal. The object of serving the defendant with such a

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copy minute is only to give him an opportunity of seeing the original. The magistrates, therefore, in this case, in issuing the warrant and in acting under it, acted without jurisdiction. In *Leary v. Patrick*, the magistrates had neglected to give themselves jurisdiction by neglecting to ascertain the costs in the conviction; so here, they have neglected to give themselves jurisdiction by not having an order under hand and seal drawn up before issuing the warrant. Therefore, that case is in point for the plaintiff. Secondly, even if the magistrates had a general jurisdiction, as contended on the other side, there was in this case, as in *Leary v. Patrick*, an excess of jurisdiction within the meaning of sect. 2 of the 11 & 12 Vict. c. 44, and the defendants were therefore liable in this action. The form given for a warrant of distress, N 2, in the schedule of the 11 & 12 Vict. c. 43, shows that the order there recited does not mean a mere verbal order, and that the order must have been disobeyed before the warrant can legally issue. The proviso in sect. 2 of the 11 & 12 Vict. c. 44, does not apply to this case; for the act here complained of is not an act done under an order, there having been no order in existence at the date of the warrant, but only the minute of the verbal order. The warrant is also bad for not reciting the order on which it is founded. They also referred to *Painter v. The Liverpool Gas Company*, 3 Ad. & E. 433; s. c. 5 Law J. Rep. (n. s.) M. C. 108. *Newbould v. Colman*, 20 Law J. Rep. (n. s.) M. C. 149; s. c. 3 Eng. Rep. 455. *Rogers v. Jones*, 3 B. & C. 409; s. c. 3 Law J. Rep. K. B. 40. *Wickes v. Clutterbuck*, 4 Bing. 483. *Daniell v. Phillips*, 1 Cr. M. & R. 662; s. c. 4 Law J. Rep. (n. s.) M. C. 67.

JERVIS, C. J. I am of opinion that this rule ought to be discharged. Without critically examining the warrant, I think we may assume that it would not bear a very close examination; that it may be defective in form in some respects. If so, I think that the case falls expressly within the provisions of 11 & 12 Vict. c. 44, s. 1, provided the defendants were acting in other respects within their jurisdiction. It is unnecessary to put a construction upon sect. 2, because, although the warrant is irregular in respect of certain formal objections, all the other proceedings are, in substance, regular. A rate is duly made, and not paid by the plaintiff, from whom it is due. He is duly convened before the justices, the matter is discussed on the 1st of April, and the final determination adjourned at his request. On the 6th of May the magistrates pronounce an order that he shall pay the rate. Here the irregularity is said to have commenced; it is said that this order is no order upon which a warrant could be founded until it is drawn up under hand and seal of the justices who made it; and that the warrant in this case, being dated the 6th of May, when no order had, in fact, been drawn up, was an excess of jurisdiction. I am, however, of opinion that on the true construction of sects. 14 and 17 of the 11 & 12 Vict. c. 43, the order may be made by parol, and a minute of that order be drawn up and a copy served, and that a formal order being afterwards drawn up and bearing date as of the day when the parol order was made, is the order of that day, and one which would justify a warrant alleging that the

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sum in fact ordered to be paid had been duly demanded and refused; although the order may not have been formally drawn up at the time the warrant issued. The act 11 & 12 Vict. c. 43, s. 14, seems clear. If a magistrate convicts, or makes an order, a minute shall be made, "and the conviction or order shall *afterwards* be drawn up in proper form," under his hand and seal. That shows that it cannot be necessary to draw up a formal order at the time when the order is in one sense *made*. Then the order, subsequently drawn up in proper form, relates back to the date of the making of the order. Sect. 17 goes on to say that "the defendant shall be served with a copy of the minute of such order before any warrant of distress shall issue in that behalf." That has here been done. I think, therefore, that the defendants have been strictly regular in the course that has been taken, although the form of the warrant may be wrong. If necessary, the court might perhaps draw a distinction between sects. 1 and 2 of the 11 & 12 Vict. c. 44. But it is not necessary. Were it so, I confess I should be inclined to think that "exceeding his jurisdiction," in sect. 2, means assuming to do something which the act under which he is proceeding could by no possibility justify, as in the case in the Queen's Bench of *Leary v. Pattrick*, where there could have been no authority to issue a distress for costs, not adjudged by a conviction, or as was the case in *Barton v. Bricknell*, in which case there was no power to order the plaintiff to be put in the stocks. But I abstain from pronouncing any opinion upon this point.

CRESSWELL, J. It appears to me that the defendants were in this case exercising their functions as magistrates, and in a matter within their jurisdiction. They certainly had jurisdiction to make orders as to the payment of church rates. They had also jurisdiction, upon refusal or neglect of the plaintiff to pay according to such order, to issue a warrant under their hand and seal to levy the amount of the rate and costs by distress. On the 6th of May they gave their decision, of which a minute was made, and a copy of that minute sent to the plaintiff. That was in the shape of an order that a certain sum should be paid for the rate, and a certain sum for costs. They did, therefore, order a sum to be paid for costs; and this distinguishes the case in that respect from *Leary v. Pattrick*, where the warrant was to levy costs not authorized by the conviction. The stat. 11 & 12 Vict. c. 43, s. 14, 17, manifestly contemplates that the magistrates shall pronounce a parol order at the time; and distinguishes between a minute of such order and the formal order which is to be drawn up in writing "afterwards." Then it is said that they had no jurisdiction to issue a warrant until the order formally drawn up has been disobeyed; and that the warrant in this case cannot have been made upon such order disobeyed, because the order drawn up and the warrant are dated on the same day. Now, it does not clearly appear that they were signed on the same day, though it is probable. But at all events, before the warrant was drawn up, the minute of the order had been prepared and served, and it is only necessary to serve the minute. Under these circumstances, I think that the case falls

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within the 1st section of the 11 & 12 Vict. c. 44, and that the rule must be discharged.

TALFOURD, J. I am of the same opinion. I consider that all the proceedings were in substance regular.

JERVIS, C. J., mentioned that WILLIAMS, J., (who had left the court to go to chambers during the argument,) agreed in thinking that the rule ought to be discharged.

Rule discharged.

DAWSON v. COLLIS & others.¹

Hilary Term, January 15, 1851.

*Pleading — Argumentativeness — Warranty — Sale by Sample —
Plea to Part, limiting the Claim in the Declaration.*

In an action on the *indebitatus* counts, the defendant pleaded that the debt was due for certain hops bargained and sold; that the plaintiff produced a sample at the bargain and sale, and promised to deliver the hops equal in quality and description to the sample, and that the hops were not equal in quality and description, wherefore the defendant refused to accept them, and broke his promise. On special demurrer, the plea was held bad, as amounting to the general issue.

Seem, that on a sale of specific goods, with a warranty that they correspond to a sample, the vendee cannot refuse to receive them on account of their not corresponding, without an express condition to that effect; but that he is left to bring his cross action, or to avail himself of the breach of warranty in reduction of damages in an action for the price. [Commenting on *Street v. Blay*, 2 B. & Ad. 456.]

The declaration claimed 1000*l.* for goods sold and delivered, goods bargained and sold, and on an account stated. The plea, pleaded as to 191*l.* parcel, &c., averred that the debt to that amount was for goods bargained and sold.

Quære, whether the plea would not have been bad, on special demurrer, for attempting to limit the plaintiff in his proof as to the sum of 191*l.*

ASSUMPSIT. for 1000*l.* for goods sold and delivered, goods bargained and sold, and on an account stated.

Fourth plea, as to 191*l.* 9*s.* 2*d.*, parcel of the moneys in the declaration mentioned, that the said sum of 191*l.* 9*s.* 2*d.*, parcel, &c., was and is claimed by the plaintiff to be due and owing to him from the defendants, and the defendants became and were indebted therein as in the declaration alleged, and made their said promise, as in the declaration alleged, so far as the same related to the said sum of 191*l.* 9*s.* 2*d.*, for and in respect of divers goods and chattels, to wit, thirty-one pockets of hops, then, to wit, on the day and year in the declaration mentioned, bargained and sold by the plaintiff to the defendants, and at their request, and that before and at the time of the said bargain and sale, and of the making of the said promise of the defendants in the declaration mentioned, as to the said sum of 191*l.* 9*s.* 2*d.*, parcel, &c., the plaintiff produced and showed to the defendants

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a certain sample of the said hops, and then promised the defendants to deliver the said hops to the said defendants, and that the whole of the said hops were equal in quality and description to the said sample; that they then bargained for and bought the said hops, and every part thereof, and made the said promise in the declaration mentioned as to the said sum of 191*l.* 9*s.* 2*d.*, parcel, &c., on the faith and terms and in consideration of the said promise of the plaintiff, and not otherwise; that the said hops were not at the time of the making of the said bargain and sale, and of the making of the said promise of the defendants, nor were they at any time since until or at the time of the commencement of this suit, nor have they since been, nor are they equal in quality and description to the said sample, but on the contrary thereof the same were and every part thereof was of a very inferior and bad and indifferent quality and description, and of much less value, and of no use or value to the defendants; wherefore the defendants did not nor would accept the said hops or any part thereof, and then broke their said promise in the declaration mentioned, so far as relates to the said sum of 191*l.* 9*s.* 2*d.*, as they lawfully might, for the causes in this plea aforesaid. Verification.

Special demurrer.

Willes, in support of the demurrer. The plea is bad in substance, and is also bad in form, as being an argumentative traverse. It states a bargain and sale of hops, the production of a sample, a promise that the bulk was equal in quality and description, and an allegation that the bulk was not equal to the sample in those respects, wherefore the defendants would not accept. Now, if the plea discloses a warranty, it is well-established law that the vendee cannot refuse to perform his promise because the warranty has been broken, but that such breach of warranty is the subject either of a cross action, or for a reduction of damages. The plea is, therefore, substantially bad; but if it be said that the goods were bargained and sold with a condition that when delivered they should be equal to the sample, the defendant might have returned them within a reasonable time, and then no such promise would have arisen as that averred in the declaration. But the defendant acknowledges in his plea that he broke the promise. The plea, therefore, is only a bad argumentative denial of the promise in the declaration. Again: the plea is bad for another reason. The declaration claims 1000*l.* for goods sold and delivered and on an account stated, as well as for goods bargained and sold, and the plaintiff was entitled to recover the whole sum on any of the counts; but the defendant, by his plea, restricts the sum of 191*l.* 9*s.* 2*d.* to the one count for goods bargained and sold, and merely attempts to prevent the plaintiff from recovering that sum on the other counts, which he has no right to do.

Hawkins, contra. The plea is not bad on account of its being pleaded only to part of the declaration. There is, in truth, but one count, stating a debt for three considerations.

[*Cresswell*, J. The plaintiff says that the defendant was indebted

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to him in 1000*l.*, and, on the general issue, he would have been entitled to succeed if he had proved that he had sold and delivered goods of the value of 1000*l.*; but the defendant pleads that as to 191*l.* the debt was not for goods sold and delivered, but for goods bargained and sold. He is thereby trying to limit the effect of the declaration.]

At all events, this objection is not one of substance, and it has not been raised in the special demurrer. The plea contains a good defence in substance.

[*Maule, J.* What do you say to the case of *Street v. Blay*? 2 B. & Ad. 456. In an action for the price of a horse which had been sold as sound, would it be a good defence that the horse was not sound?]

In the case referred to, the horse had been actually accepted; but it has not been held in any case that when goods are sold with a warranty that they shall correspond with a sample, the vendee is obliged to accept goods which do not agree with the sample. This plea is analogous to a plea of fraud, stating a sale of certain hops, and that when they were delivered they did not correspond with the sample, which gave the vendee a right to repudiate the contract.

[*Maule, J.* My impression from *Street v. Blay*, although the point is not decided there, is, that unless there be an express condition that the goods may be returned if not equal to the sample, one cannot be implied.

Williams, J. The property passed to the defendants by the bargain and sale, and therefore they could not rescind the contract.

Maule, J. If a man, pointing to a sack, were to say, "I sell you that sack of wheat," and it turned out to be a sack of beans, the property would at once pass to the vendee, and he could not send back the beans.]

Willes, in reply.

[*Cresswell, J.* I find that Mr. Smith, in his notes to *Cutter v. Powell*, 2 Smith's L. C. 15, says that it is settled by *Street v. Blay*, and *Poulton v. Lattimore*, 9 B. & C. 259; s. c. 7 Law J. Rep. K. B. 225, that where an article is warranted, and the warranty is not complied with, the vendee has three courses which he may pursue: first, he may refuse to receive the article; secondly, he may receive it, and bring a cross action for the breach of warranty; or, thirdly, he may use the breach of warranty in reduction of the damages in an action brought by the vendor for the price.]

Jervis, C. J. I think that this plea is no answer to the declaration. I am inclined to think that the correct principle to be derived from *Street v. Blay* is, that in the sale of a specific enumerated article, the buyer has no right to say that the article does not correspond with the description given, and, therefore, to repudiate the contract. The remedy in such a case is to bring an action on the warranty, or to get a reduction of damages. But it is unnecessary to decide that question, from the course which the argument has taken, because if proof of warranty be a necessary condition for recovery, then there is no promise to pay, and no bargain or sale, unless the specific article be

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accepted. That is a defence under the general issue. I entertain some doubt as to the form of the plea. If it is bad, however, it is bad only on special demurrer, and as the objection is not taken in the demurrer, it is not necessary to decide that. [The case of *Parsons v. Sexton*, 4 Com. B. Rep. 899; s. c. 16 Law J. Rep. (N. S.) C. P. 181, will be found in point.]

MAULE, J. I am of the same opinion. The defendant's counsel says the law confers on a vendee the right of refusing to take or pay for an article sold, and says that the law is to be taken notice of by the court, as arising from the facts stated in the plea. I think it does not so arise. But supposing that hypothesis to be correct, the plea is equal to a plea stating the same contract as that in the declaration, along with a condition, that if the goods were not according to the sample, the defendants were at liberty to refuse them, and that they did so. A plea in that form, I think, clearly amounts to a denial of such a sale or delivery as would raise any debt, and is a circuitous way of pleading the general issue; that point is taken by the demurrer. Certainly there is language used in some of the cases as to the delivery of an article sold with a warranty, which raises some doubt whether in a case of the bargain and sale of a specific chattel, with a warranty, but without a condition of refusal, the same law applies as in *Street v. Blay*; but I think the principle applied in *Street v. Blay* ought to be extended, and that it is just and convenient to hold that the proper remedy is that which the parties expressly provide for, namely, an action on the warranty, or a reduction of damages, as in *Allen v. Cameron*, 1 Cr. & M. 832; s. c. 2 Law J. Rep. (N. S.) Exch. 263, and in other cases. I have no doubt about that being the law; but we can hold that the plea is bad, without deciding that question.

CRESSWELL, J. I am of the same opinion. I think if it be part of the case to prove that the article is of the particular description warranted, the matter of defence arises on the general issue. Where there is a sale of an individual chattel, there the vendee can only defend himself altogether by a cross action, as in *Poulton v. Lattimore*, or partly by a reduction of damages. I apprehend that the note in Smith's Leading Cases does not mean that *Street v. Blay* and *Poulton v. Lattimore* decided the three points there mentioned, but only that these points might be inferred from the decision.

WILLIAMS, J. I am of the same opinion. I think that this plea either amounts to a denial that the goods were bargained and sold, and is, therefore, equal to the general issue, or it admits the bargain and sale, and justifies non-payment on the ground of a breach of warranty; but I apprehend, as the property passed by the bargain and sale, there is nothing in the plea to show that the defendant was justified in rescinding the contract, although, if he had proved the facts stated in the plea, he would have been entitled to a reduction of damages. I think that there are several defects in the form of the plea, but it is not necessary to refer to any other objections.

Husband v. Davis.

HUSBAND v. DAVIS.¹

Hilary Term, January 18, 1851.

Pleading — Bond — Payment of Part after Day — 4 & 5 Ann. c. 16, s. 12 — Payment to one of two Trustees.

To debt upon bond, the defendant may plead as to part, payment in satisfaction *post diem* under 4 & 5 Ann. c. 16, s. 12.

Payment to one of two trustees binds both.

DEBT on bond. The declaration stated that by an indenture of the 16th of December, 1842, the defendant agreed to pay the plaintiff and Robert Hart 1000*l.* on the 21st of May then next, and interest in the mean time at 5*l.* per cent.; that Hart died; that the defendant did not pay to the plaintiff and Hart in Hart's lifetime, nor to the plaintiff since Hart's death, and that the 1000*l.* and 125*l.* for interest were due from the defendant to the plaintiff.

Plea, as to 200*l.* parcel of the 1000*l.*, and as to 25*l.* parcel of the 125*l.*, that the said sum of 25*l.* is claimed as interest on 200*l.* parcel, &c., for two years and a half, and that the defendant before the commencement of the said period of two years and a half, to wit, on the 21st of May, 1847, and in the lifetime of Hart, paid Hart the sum of 200*l.*, which Hart then accepted in full satisfaction and discharge of the sum of 200*l.*, parcel, &c.

Replication traversing the payment and acceptance of the 200*l.* in satisfaction and discharge.

At the trial, before Pollock, C. B., at the Guildford Summer assizes, 1850, a payment was proved of 200*l.* to Hart on the 21st of May, 1847, and it appeared that the plaintiff and Hart were trustees under a marriage settlement. It was objected that the payment to one of two trustees was insufficient; and by the direction of the judge, the jury found a verdict for the plaintiff for the full amounts, leave being reserved for the defendant to move to reduce the damages by 200*l.*, and enter a verdict for the defendant on the plea of payment.

A rule *nisi* was obtained accordingly, the plaintiff having permission to object to the validity of the plea, and to show that he was entitled to judgment *non obstante veredicto*, if the rule should be made absolute.

Willes now showed cause against the rule to enter the verdict for the defendant. This is an action on a deed for a sum of money payable on a day certain, and the plea is one of accord and satisfaction after the day. The plea does not come under the statute 4 & 5 Ann. c. 16, s. 12, which enacts, that where an action of debt is brought upon any single bill, if the defendant hath paid the money due upon such bill, he may plead the payment in bar. Here there was a payment of part only of the money due, and the statute gives no author-

¹ 20 Law J. Rep. (N. S.) C. P. 118.

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ity for pleading such a plea. Then, at common law, this is a bad plea of accord and satisfaction; for an acquittance under seal is necessary to show the payment of a specialty debt. The forms of the pleas of *solvit ad diem* and *solvit post diem*, given in 3 Chit. Pl., 7th ed. p. 183, show that they apply to the whole sum mentioned in the condition only, and not to any part of it. This is, in fact, a plea of accord and satisfaction, *post diem*.

[*Maule, J.* The statute says payment after the day may be pleaded. This is a plea of payment and acceptance after the day. Surely that is sufficient, especially after verdict.]

The objection to the plea is, that it is pleaded only to part, which was held to be a fatal objection in *Worthington v. Wigley*, 3 Bing. N. C. 454; s. c. 5 Law J. Rep. (N. S.) C. P. 325, where to debt on bond for 1100*l.* given by the defendant to the plaintiff's wife *dum sola*, and conditioned for the payment of 532*l.* 19*s.* on the 31st of January, 1832, the defendant pleaded, as to part of the sum, that after the day the obligee received certain bills of exchange not yet due on account of that part, and as to the residue, payment of moneys in satisfaction, and the pleas were held bad. *Marriage v. Marriage*, 1 Com. B. Rep. 761; s. c. 14 Law J. Rep. (N. S.) C. P. 244, is an authority to the same effect.

[*Maule, J.* That was a very special case. There, there was an agreement to pay less than the debt due at a particular time, otherwise the bond was to remain in force for the whole debt.]

But supposing the payment of part may be pleaded under the statute, the payment to one of the two trustees was not sufficient. In the case of *Innes v. Stephenson*, 1 Moo. & R. 145, it was laid down by Lord Tenterden, that bankers are not discharged by a payment to one of several persons not being partners in trade, on whose joint account the money had been paid into the bank without the authority of the others.

[*Maule, J.* That case is different from a covenant in a deed to pay to two trustees.]

It was laid down in the case of *Foley v. Hill*, 2 House of Lords Cases, 28, that the relation of a banker to his customer is merely that of debtor and creditor, with the additional duty of paying the customer's checks.

[*Williams, J.* There is the case of *Wallace v. Kelsall*, 7 Mee. & W. 264; s. c. 10 Law J. Rep. (N. S.) Exch. 12, against you. There, in an action by three plaintiffs for a joint demand, the defendant pleaded accord and satisfaction with one plaintiff by a part payment in cash, and a set-off of a debt due from that one to the defendant; and the plea was held good.

Maule, J. It is part of the law merchant that bankers shall not pay to one of several jointly interested, without the consent of the others, except by an express agreement. But this is not a case of banker and customer. In *Wallace v. Kelsall*, Lord Abinger said that the accord and satisfaction operated as a release by the one plaintiff with whom it was entered into, and there is no doubt that a release by one is a good answer.]

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J. Brown, in support of the rule, was stopped by the court.

MAULE, J. We think that Mr. Willes has failed to show that this plea is bad under the statute of Anne. As to the other question in the case, it is a general rule that a man may pay a debt to one of several persons with whom he has contracted jointly. In the case of a banker he cannot do so; but that arises from the particular contract which exists between him and his customer. I do not entertain any doubt about the question, and I therefore think that the rule should be made absolute.

WILLIAMS and TALFOURD, JJ., concurred.

Rule absolute.

HARRIS v. PHILLIPS.¹

Hilary Term, January 31, 1851.

Pleading — Certainty — Time and Amount — Videlicet — Hire.

When a contract is alleged in pleading to have been for a "certain" time or amount, it is sufficient to prove that some specific time or amount was agreed upon, and it is not necessary to prove the precise time or amount laid under a *videlicet*.

The declaration stated that the defendant promised to hire horses from the plaintiff, and employ them for a certain space of time, to wit, for the space of one year, and to pay the plaintiff for the use thereof certain hire and reward, to wit, 50*l.* a year for each of the horses, payable quarterly:—

Held, that the allegations after the *videlicets* were immaterial; that although it was proved that the hiring was for a week, and from week to week, at the hire of 50*l.* a year for each horse, payable weekly, there was no fatal variance; that the words "hire and reward" include time as well as amount, and therefore that the words "payable quarterly" were covered by the *videlicet* as well as the sum.

ASSUMPSIT. The declaration stated that heretofore, to wit, on the 22d of June, A. D. 1849, in consideration that the plaintiff would supply on hire to the defendant, for the purpose of drawing a cart for carrying goods, divers, to wit, two horses fit and proper for the purpose aforesaid, each of the said horses to be used on alternate working days, the defendant promised the plaintiff to hire such horses from the plaintiff, and to keep and employ the said horses on hire for the purpose and in manner aforesaid for a *certain space of time* then agreed upon between the plaintiff and the defendant, to wit, for the space of *one year* thence ensuing, and to pay the plaintiff for the use thereof *certain hire and reward* in that behalf, to wit, 50*l.* a year for each of the said horses, payable quarterly, and to take due and proper care of the horses, and employ them, &c.; that the plaintiff was ready and willing to supply the horses, and did hire two fit horses according to the agreement, &c. First breach, that before the

¹ 20 LAW J. Rep. (N. S.) C. P. 120. 15 Jur. 538.

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expiration of the said space of time agreed upon, to wit, on the 18th of February, 1850, the defendant wrongfully, &c., refused to use, keep, and employ the horses. Second breach, that the defendant did not, while the said horses were in her use and employ, take due and proper care of them.

Plea — *Non assumpsit*.

It was proved at the trial, before Talfourd, J., at the sittings for Middlesex, in Hilary term, 1851, that the agreement between the plaintiff and the defendant was for the hire of the horses for a week, and so on from week to week, at the rate of 50*l*. a year, to be paid weekly. It was objected, for the defendant, that there was a variance, and the learned judge refused leave to amend. The jury, under his lordship's direction, found a verdict for the defendant, leave being reserved to the plaintiff to move to enter a verdict for himself, with 9*l*., which the jury found to be the damages on the second breach.

A rule *nisi* having been obtained accordingly,—

Humphrey and *Bovill* now showed cause. The plaintiff avers that the contract was for a certain time agreed upon, and he must make that out. The first breach is, for not employing the horses within the time agreed upon, and it is, therefore, necessary to state what was the time agreed upon, and the allegation of time is therefore material, although laid under a *videlicet*. *Preston v. Butcher*, 1 Stark. 3, is a direct authority to that effect.

[*Maule, J.* That case shows that when you state in a declaration a contract for a specific sum, though laid under a *videlicet*, the fact of the sum being under a *videlicet* does not relieve you from proving that a certain sum was agreed on, although it does relieve you from proving the particular certain sum mentioned.]

The principle is, that when the time or sum is part of the contract, the *videlicet* does not relieve the party alleging it from the necessity of proving it, but if it be no part of the contract, the *videlicet* has that effect. *Edge v. Trafford*, 1 Cr. & J. 391; s. c. 9 Law J. Rep. Exch. 101. *Skinner v. Andrews*, 1 Wms. Saund. 169; and *Cooper v. Blick*, 2 Q. B. Rep. 915; s. c. 11 Law J. Rep. (N. S.) Q. B. 85. The time in this case was of the substance of the contract.

[*Jervis, C. J.* *Preston v. Butcher* shows that "certain" means "definite."]

The allegation that the hire was to be paid quarterly is material, and at variance with the evidence.

Byles, Serj., and *Charnock*, in support of the rule, were not called upon by the court.

JERVIS, C. J. I think that the rule should be made absolute for entering a verdict for the plaintiff, with 9*l*. damages. Several questions have arisen; and the first is, whether the time laid under the *videlicet*, and the amount of hire and reward, are material and part of the contract which the plaintiff was bound to prove. I am of opinion that they are not. All that it is necessary to state is the contract.

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The declaration would be bad on general demurrer, unless the contract were stated with certainty. To comply with this rule, both the time and the amount have been stated; but they have been stated under a *videlicet*. I think we may correctly reject what follows the *videlicet*, and read the declaration as stating only a contract for a certain time at a certain hire. The next question is, whether the evidence shows a certain time under the authorities which hold that the time must be a fixed time. It shows that there was a contract for a week, and from week to week, and that the time was therefore certain, by the continuing agreement between the parties. The next question is one of more difficulty, namely, whether the *videlicet* applies to the words "payable quarterly," or only to the words "50*l.* a year for each of the two horses." To satisfy the rules of pleading, the plaintiff must show when the hire was payable, and what the amount was; and if he has shown that, the rest is immaterial. What is hire? Hire involves the time and the amount payable; and, therefore, what follows the *videlicet* is not a substantial allegation, but a technical expansion of the preceding allegation to avoid a special demurrer. In substance the declaration was proved, and the rest is immaterial.

MAULE, J. I agree with my lord chief justice as to the principles which apply to this case.

CRESSWELL, J. The difficulty I have felt in this case is with regard to the time of payment, whether the payment quarterly was under the *videlicet* or not. But I think the words "hire and reward" include the time of payment, and show that a certain time was agreed upon; and then what follows the *scilicet* is immaterial.

WILLIAMS, J. I am of the same opinion. I am quite contented with the case of *Cooper v. Blick*, which governs the present.

Rule absolute.

LEVY v. MOYLAN & others.¹

Hilary Term, January 31, 1851.

Judgment as in Case of Nonsuit — Peremptory Undertaking — Special Jury.

Where a rule for judgment as in case of a nonsuit has been discharged on a peremptory undertaking to try at the first sittings, the plaintiff cannot throw the trial over the sittings by getting a rule for a special jury, and having the cause marked by the marshal for a special jury.

TRESPASS for false imprisonment. Issue was joined in July, 1849, and the plaintiff having failed to go down to trial, a rule for judg-

¹ 20 Law J. Rep. (N. s.) C. P. 122.

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ment as in case of a nonsuit was obtained on the 13th of November, 1850, which was discharged on the plaintiff giving a peremptory undertaking to try at the first sittings in the next term. On the 4th of January, 1851, notice of trial was given for the first sittings in Hilary term, which took place on the 18th of January. On the 14th, the plaintiff set down the cause for trial at the first sittings; but on the same day he obtained a rule for a special jury, and had the cause marked by the marshal as a special jury cause. The cause was passed over on the first day of the sittings, and made a *remanet*. On the 25th, a rule absolute was obtained for judgment as in case of a nonsuit. The plaintiff's affidavit stated that the special jury was not obtained for delay. The plaintiff afterwards obtained a rule *nisi* for setting aside the last-mentioned rule as irregular.

Byles, Serj., and *Ogle* now showed cause, and

S. Temple and *J. Thompson* supported the rule.

JERVIS, C. J. The plaintiff did not comply with his undertaking. He undertook to try at a time when by the practice of the court he could not try by a special jury; and this rule, therefore, must be discharged.

Per curiam.

Rule discharged.

ELECTRIC TELEGRAPH COMPANY v. BRETT & LITTLE.¹

Easter Term, April 26, 1851.

*Patent — Infringement — Evidence — Subsequent Discoveries —
Title — Specification — Claims.*

A claim for a patent for improvements in the mode of doing any thing by a known process is sufficient to entitle the claimant to a patent for his improvements, when applied either to the process as known at the time of the claim, or to the same process altered and improved by discoveries subsequently published, so long as it remains the same with regard to the improvements claimed, and their application.

A declaration in case for the infringement of a patent, "for improvements in giving signals and sounding alarms in distant places by means of electric currents transmitted through metallic circuits," alleged that the defendants had used "the said invention." The specification of the patent made nine several claims in respect of different improvements. The jury having found an infringement in respect of one of such improvements, that was held to be a sufficient finding of the infringement alleged in the declaration.

The title of the patent and every part of the specification in which directions were given for putting the apparatus in use, mentioned "metallic circuits" as the means by which the electric current was conveyed, but no claim was made in respect of such circuits. At the time of the patent it was not known, but it was subsequently discovered, that the earth might be used to complete the circuit to an extent of almost one half of the circuit, and that metal might be dispensed with to that extent, and the defendants had always used this new discovery:—

¹ 20 Law J. Rep. (N. S.) C. P. 123. 15 Jur. 579.

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within the 1st section of the 11 & 12 Vict. c. 44, and that the rule must be discharged.

TALFOURD, J. I am of the same opinion. I consider that all the proceedings were in substance regular.

JERVIS, C. J., mentioned that WILLIAMS, J., (who had left the court to go to chambers during the argument,) agreed in thinking that the rule ought to be discharged.

Rule discharged.

DAWSON v. COLLIS & others.¹

Hilary Term, January 15, 1851.

*Pleading — Argumentativeness — Warranty — Sale by Sample —
Plea to Part, limiting the Claim in the Declaration.*

In an action on the *indebitatus* counts, the defendant pleaded that the debt was due for certain hops bargained and sold; that the plaintiff produced a sample at the bargain and sale, and promised to deliver the hops equal in quality and description to the sample, and that the hops were not equal in quality and description, wherefore the defendant refused to accept them, and broke his promise. On special demurrer, the plea was held bad, as amounting to the general issue.

Semble, that on a sale of specific goods, with a warranty that they correspond to a sample, the vendee cannot refuse to receive them on account of their not corresponding, without an express condition to that effect; but that he is left to bring his cross action, or to avail himself of the breach of warranty in reduction of damages in an action for the price. [Commenting on *Street v. Blay*, 2 B. & Ad. 456.]

The declaration claimed 1000*l.* for goods sold and delivered, goods bargained and sold, and on an account stated. The plea, pleaded as to 191*l.*, parcel, &c., averred that the debt to that amount was for goods bargained and sold.

Quere, whether the plea would not have been bad, on special demurrer, for attempting to limit the plaintiff in his proof as to the sum of 191*l.*

ASSUMPSIT. for 1000*l.* for goods sold and delivered, goods bargained and sold, and on an account stated.

Fourth plea, as to 191*l.* 9*s.* 2*d.*, parcel of the moneys in the declaration mentioned, that the said sum of 191*l.* 9*s.* 2*d.*, parcel, &c., was and is claimed by the plaintiff to be due and owing to him from the defendants, and the defendants became and were indebted therein as in the declaration alleged, and made their said promise, as in the declaration alleged, so far as the same related to the said sum of 191*l.* 9*s.* 2*d.*, for and in respect of divers goods and chattels, to wit, thirty-one pockets of hops, then, to wit, on the day and year in the declaration mentioned, bargained and sold by the plaintiff to the defendants, and at their request, and that before and at the time of the said bargain and sale, and of the making of the said promise of the defendants in the declaration mentioned, as to the said sum of 191*l.* 9*s.* 2*d.*, parcel, &c., the plaintiff produced and showed to the defendants

¹ 20 Law J. Rep. (N. S.) C. P. 116.

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a certain sample of the said hops, and then promised the defendants to deliver the said hops to the said defendants, and that the whole of the said hops were equal in quality and description to the said sample; that they then bargained for and bought the said hops, and every part thereof, and made the said promise in the declaration mentioned as to the said sum of 191*l.* 9*s.* 2*d.*, parcel, &c., on the faith and terms and in consideration of the said promise of the plaintiff, and not otherwise; that the said hops were not at the time of the making of the said bargain and sale, and of the making of the said promise of the defendants, nor were they at any time since until or at the time of the commencement of this suit, nor have they since been, nor are they equal in quality and description to the said sample, but on the contrary thereof the same were and every part thereof was of a very inferior and bad and indifferent quality and description, and of much less value, and of no use or value to the defendants; wherefore the defendants did not nor would accept the said hops or any part thereof, and then broke their said promise in the declaration mentioned, so far as relates to the said sum of 191*l.* 9*s.* 2*d.*, as they lawfully might, for the causes in this plea aforesaid. Verification.

Special demurrer.

Willes, in support of the demurrer. The plea is bad in substance, and is also bad in form, as being an argumentative traverse. It states a bargain and sale of hops, the production of a sample, a promise that the bulk was equal in quality and description, and an allegation that the bulk was not equal to the sample in those respects, wherefore the defendants would not accept. Now, if the plea discloses a warranty, it is well-established law that the vendee cannot refuse to perform his promise because the warranty has been broken, but that such breach of warranty is the subject either of a cross action, or for a reduction of damages. The plea is, therefore, substantially bad; but if it be said that the goods were bargained and sold with a condition that when delivered they should be equal to the sample, the defendant might have returned them within a reasonable time, and then no such promise would have arisen as that averred in the declaration. But the defendant acknowledges in his plea that he broke the promise. The plea, therefore, is only a bad argumentative denial of the promise in the declaration. Again: the plea is bad for another reason. The declaration claims 1000*l.* for goods sold and delivered and on an account stated, as well as for goods bargained and sold, and the plaintiff was entitled to recover the whole sum on any of the counts; but the defendant, by his plea, restricts the sum of 191*l.* 9*s.* 2*d.* to the one count for goods bargained and sold, and merely attempts to prevent the plaintiff from recovering that sum on the other counts, which he has no right to do.

Hawkins, contra. The plea is not bad on account of its being pleaded only to part of the declaration. There is, in truth, but one count, stating a debt for three considerations.

[*Cresswell*, J. The plaintiff says that the defendant was indebted

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patentees was to be carried into operation, proceeded as follows: "Having now described our said improvements, I, &c., do hereby declare that the new invention, whereof the exclusive use is granted to us, consists in the following particulars. [Then followed nine distinct heads of claim, of which the following are material.] Firstly, in the improvements hereinbefore described, for the purpose of communicating determinate angular motions to magnetic needles by means of electric currents transmitted through metallic circuits, and the adaptation of such angular motions for the purpose of giving signals in distant places. I wish to be understood that we make no claim to the application of the multiplying coils of conducting wires, hereinbefore described. But the improvement we have made in the adaptation of magnetic needles to the purpose of giving signals is, in disposing the needles in vertical planes, (the axes whereon they are fixed being horizontal,) and in making the needles heavier at one end than the other, in order to give them a decided preponderance, or tendency to hang perpendicular and point upwards when they are not influenced by electric currents; and in limiting the angular motions of the needles (when they are so influenced) to some certain determinate extent, by providing fixed stops against which the needles may recline and continue at rest for a time, in suitable inclining directions, for pointing out, on a vertical dial, the significations of the signals they are to give." "Secondly, in the improvement hereinbefore described, of combining several magnetic needles so that they will point out on one dial (suitably marked) the significations of the signals which they are to give, by the determinate angular motions which are communicated to them by electric currents." "Fifthly, in the improvement hereinbefore described, whereby a set of combined conducting wires, as aforesaid, having a voltaic battery and a set of buttons, or finger keys, and also a dial with magnetic needles for giving signals, as well as an apparatus for sounding alarums at each end of the set, may also have duplicates of such dials, with needles and apparatus for alarums at intermediate places; all such duplicates operating simultaneously with each other, and with the two end dials and alarums, to give like signals, and sound like alarums."

Subsequently to the letters patent, it was discovered that in order to complete the circuit, and produce the deflection of the magnetic needle, it is not necessary to have two wires between the points of communication, but that by using one wire and fixing its two ends in the earth at a distance from one another, and transmitting the electric current along the wire, the electric current will instantaneously return to the other end of the wire, and so complete the circuit as effectually as by a return wire upon the previously invented plans. In the telegraph used by the defendants, the earth had been so employed. Throughout the specification of the plaintiffs it was assumed that the mode of completing the circuit so as to produce the necessary effect upon the needle was by means of wires or other then known means of conducting the electric current in the required circuit. And wherever a circuit was mentioned in the specification,

a "metallic circuit" was spoken of. The drawings also referred to in the specification were formed upon the same assumption. In order to make use of the plaintiffs' patent it was necessary to use five wires for the purpose of conveying the electric current to the distant needles, so as to make the necessary signals, and a sixth wire to complete the circuit when inconvenient to use one of the other five. The defendants, by means of one wire and two needles and a system of repeating and counting the deflections of those needles and reversing the direction of the current, had produced the same results as could be produced by the plaintiffs' patent, in communicating information at a distant place. There was also this difference between the plaintiffs' patent and the machine used by the defendants; needles were used in the former, acting in vertical planes on horizontal axes, and pointing out on a vertical dial the signals intended to be given; the defendants had adopted a new mode of placing their needle with reference to the wires, but the required signals were produced, also on a vertical dial, by means of what was called a magnetic ring and indicator, also acting in a vertical plane and on a horizontal axis. There was also some evidence that, by the plaintiffs' patent, it was possible to produce the same signals at all the intermediate stations as well as at the *termini* simultaneously, but not for the intermediate stations to return such signals; the defendants' method enabled the intermediate stations as well as the *termini* to *send* as well as to return signals. The method of sending signals to intermediate stations was described in the specification, and consisted in using at those stations duplicates of the dials and apparatus used at the terminal stations. The specification made no specific claim to any particular method of making the signals, nor to any system as a whole, either of counting, or any other operation, nor to any particular kind of circuit, metallic or otherwise, but only to the particular improvements pointed out and explained in the specification.

At the close of the plaintiffs' case, the defendants' counsel submitted that the plaintiffs must be nonsuited, on the ground that it was an essential part of the invention patented that "metallic circuits" should be used, and that the defendants, by using the earth to complete the circuit, had used a totally different invention from that patented, and were, therefore, not guilty of any infringement. The chief justice refused to nonsuit the plaintiffs, but reserved to the defendants leave to move to enter a nonsuit on this ground. At the end of the case his lordship left several questions to the jury, in answer to the third of which the jury found "that the magnetic ring and indicator of the defendants is a different instrument from the needle claimed in the plaintiffs' specification." In answer to the fourth question, they found "that the sending of signals to intermediate stations was new to the plaintiffs." To the fifth, "that the angular motions of the needles in vertical planes on horizontal axes, conjointly with the stops, were new to the plaintiffs." To the sixth "that, as a whole, the system of counting with one wire and two needles, used by the defendants, is not the same as the system of the

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plaintiffs. Upon these findings, it was contended that the verdict ought to be entered for the defendants, on the ground that, taking the third and the fifth answers together, it appeared that there was no infringement of the plaintiffs' patent as regarded the needles, inasmuch as the jury had found that the magnetic ring and indicator, which the defendants had substituted for the needles, were a different instrument from the needles claimed in the specification. It was also contended that the verdict could not be entered for the plaintiffs, upon the fourth answer, inasmuch as the sending of signals to intermediate stations, however new, was not part of the subject of the plaintiffs' patent, or of any patent, but merely a bare idea — a self-evident result to be achieved, which the defendants had a right to achieve by their own method; and that by the sixth answer the jury had negatived any infringement of the plaintiffs' patent, the whole foundation of which rested upon the use of more wires than one. The chief justice, however, directed the verdict to be entered for the plaintiffs, with leave to the defendants to move to enter a verdict, or for a nonsuit. Taking the fifth answer, together with the question put by the learned judge, it appeared that the jury intended to find, and had found, that the particular matters mentioned in that answer were not only new, but had been adopted by the defendants, but it was not clear whether they had found that the matters mentioned in the fourth answer had been used by the defendants or not.

Cockburn (April 20, 1850) having obtained a rule accordingly, and also for a new trial generally, —

The *Attorney General*, (Sir J. Jervis,) *Martin M. Smith*, and *Grove* (May 23, 1850) showed cause. The verdict was rightly entered for the plaintiffs. The jury, by their fourth and fifth answers, have found that the defendants have adopted two substantial parts of the invention described in the patent, and that those parts were new inventions at the time of the patent. It is said that there is no infringement, because the defendants have never used a metallic circuit, but a circuit consisting in a large proportion of a non-metallic substance, the earth. But this does not prevent such adoption by the defendants from being an infringement of the plaintiffs' invention. *Newton v. The Grand Junction Railway Company*.¹ No one has a right to take the patentees' invention and use it with a semi-metallic instead of a metallic circuit, without a license from the owners of the patent. It is further said that the system of counting with two needles, and with one wire instead of five, being found to be a different system from that described in the plaintiffs' patent, the patent cannot have been infringed by the use of such system. To this objection, the same answer applies. It does not follow that, because the defendants may have discovered a more perfect system, they may, therefore, adopt the patentees' inventions without a license. It may also be answered that the "system" is not that which the specification claims, but the particular improvements therein pointed out. As to the finding of the jury that the magnetic ring and indicator is a

¹ Exch. Mich. term, 1845, not reported.

different instrument from the plaintiffs' needle, that finding is immaterial as regards the plaintiffs' right to retain their verdict, for they have also found that the needle of the plaintiffs suspended vertically on horizontal axes, was new, and has been infringed. With regard to the repetition of signals at intermediate stations, it is distinctly found that this is a new invention of the plaintiffs, and was adopted by the defendants: the fifth claim in the specification distinctly puts this forward as part of the invention patented; and the method of carrying it into effect is pointed out in the specification. Upon the whole, it is submitted that the fourth and fifth answers of the jury are a conclusive finding in favor of the plaintiffs.

Cockburn, Webster, and Chance, (May 24, 1850,) in support of the rule. Taking the title of the patent and the specification together, it is obvious that metallic circuits were the basis of the invention. The claim of the patentees is not for any one particular thing, but for an invention consisting of the whole in combination, including a metallic circuit. By that claim the plaintiffs must stand or fall. The words "transmitted through metallic circuits" in the title of the patent are a material part of the patentees' claim; and the plaintiffs having failed to prove any infringement of an invention to which that description would apply, ought to have been nonsuited at the trial. *Croll v. Edge*, 19 Law J. Rep. (N. S.) C. P. 261. Any one reading the title of this patent and the specification, and having secretly discovered the transmission of the electric current through the earth so as to complete the circuit, and intending to use inventions of his own similar to the plaintiffs' in combination with that discovery, would not have thought it worth while to oppose the granting of this patent, being for so essentially different an invention from his own. The third finding of the jury is an answer to the plaintiffs' claim to the verdict in respect of the fifth finding, for they say that the magnetic ring and indicator, by which the same results were admitted to be produced as by the vertical needles of the plaintiffs, were a different instrument. The conveying signals to intermediate stations is not an invention the subject of a patent, but merely an idea to which the defendants had as much right as the plaintiffs, and which they were at liberty to carry into effect, as they had done, by means different from those adopted for the transmission of signals in the plaintiffs' patent. The sixth finding of the jury is a conclusive answer to the plaintiffs' right to retain their verdict. It is, in effect, a finding that the defendants' invention is altogether different from the patentees'. It is also clear that as regards the intermediate stations the two inventions are different, for it is admitted that the plaintiffs' telegraph could only transmit signals from the termini to the intermediate stations, whereas the defendants' apparatus reciprocates signals between all the stations, intermediate as well as terminal. There ought, at least, therefore, to be a new trial.

[*Maule, J.* No; you ought to obtain a license from the plaintiffs.]

The verdict, at all events, ought not to be entered for the plaintiffs. The declaration alleges an infringement of the *said* invention; that

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is, of an invention consisting of a combination of numerous things. The proof and the finding of a jury amount only to an adoption of certain *parts* of the patented invention. The declaration, therefore, is not proved.

Cur. adv. vult.

Judgment was now (April 26) delivered by

CRESSWELL, J. This was an action by the plaintiffs claiming as assignees of a patent granted in 1837, to W. F. Cooke and Charles Wheatstone, "for improvements in giving signals and sounding alarms in distant places by means of electric currents transmitted through metallic circuits." The declaration recites the letters patent and several indentures of assignment, whereby the plaintiffs became assignees of the letters patent, and alleges infringements by the defendants in using and counterfeiting the invention. The defendants, after setting out on over the letters patent and the indentures of assignment, pleaded certain pleas denying the plaintiffs' title as assignees of the patent, and also the plea of not guilty, and pleas denying that the patentees were the first inventors of the improvements, denying that the invention was new, and denying the utility of some parts of the invention claimed in the specification. Issues being joined on these pleas, the case was tried, before Chief Justice Wilde, at the sittings after Hilary term, 1850, when a verdict was found for the plaintiffs, and also certain special matters in answer to questions put to the jury by the lord chief justice, subject to leave to move on the part of the defendants; in pursuance of which, in Easter term, 1850, a rule was obtained calling on the plaintiffs to show cause why a verdict should not be entered for the defendants on the plea of not guilty, or why a nonsuit should not be entered or a new trial had. Cause was shown against this rule in last Trinity term. The argument on that occasion turned upon the question, What was the proper verdict to be entered in respect of the special matters found by the jury in answer to the questions of the lord chief justice? Those answers were, so far as it is material to state them, in answer to the third question, that the magnetic ring and indicator of the defendants is a different instrument from the needle claimed in the plaintiffs' specification. In answer to the fourth question, that the sending of signals to intermediate stations was "new to the plaintiffs," by which expression is to be understood that it was a new invention of the patentees. In answer to the fifth question, that the angular motions of the needles in vertical planes or horizontal axes conjointly with the stops were "new to the plaintiffs," meaning, as before, a new invention of the patentees. In answer to the sixth question, that, as a whole, the system of counting with one wire and two needles (which it appeared in evidence was a system used by the defendants) is not the same as the system of the plaintiffs. In the argument, on showing cause, it was insisted for the plaintiffs that they were entitled to retain the verdict in respect of the answers of the jury to the fourth and fifth questions. The defendants, it was said, were guilty of infringement within the terms of the declaration in having used

the matters referred to in those answers, those matters having been duly specified and being fit subjects of a patent, and comprehended within the terms of the patent itself. Some discussion took place on the argument, as to whether the defendants had been shown to have used the matters referred to in those fourth and fifth answers, in the result of which it appeared that the defendants had used the sending of signals to intermediate stations by means of duplicates at those stations of the coils and apparatus used at the terminal stations. As to the fifth answer, it appeared that the defendants had used an instrument moving in a vertical plane which they called a magnetic ring and indicator, producing the same or very nearly the same result as would be produced by the needle described in the specification; but as the jury, in answer to the third question, had found that the magnetic ring and indicator of the defendants is a different instrument from the needle claimed in the plaintiffs' specification, it was insisted for the defendants, that the use of the ring and indicator was no infringement of the patent. This objection applied to so much of the infringement as consisted in using an instrument or portion of machinery moving in a vertical plane, and is of a much less general and important nature than the objections to the plaintiffs' right to a verdict in respect of either of the two alleged infringements.

The first of these objections, and that which was mainly relied on for the defendants, was, that the patent of the plaintiffs being described in the title, and also the invention patented being described in the whole of the specification wherever mentioned, as an invention for improvements in giving signals and sounding alarms in distant places by means of electric currents transmitted through metallic circuits, would protect the improvements of the patentees only when such improvements were applied to metallic circuits, and that no use of such improvements would be an infringement of the patent if the electric current acting on the improved machinery were not wholly transmitted through a metallic circuit; and as it no doubt appeared by the evidence that the electric current used by the defendants had been transmitted through a circuit not only metallic, but through a circuit which, though metallic in its larger portion, was not continuously metallic throughout, but was made up in a proportion which, though it must be less than the half of the whole circuit, might be a very large one, by using the earth as the connection between two portions of the metal, it was insisted that no infringement had been made by the defendants, or indeed could be made, as long as the circuit they used was not metallic throughout, but to a substantial extent non-metallic.

This objection is of a grave character, and well deserving of consideration; but we are of opinion that, considering it with reference to the specification, and to the matters which appeared in evidence at the trial, it ought not to prevail. It appeared in evidence that at the time of the grant of the patent the transmission of electric currents through metallic circuits was known, and that it was also known that the power of the current might be increased by means of coils in the wire by which it was transmitted, so as to deflect the magnetic

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needle, and thereby give a signal; it also appeared, that after the grant of the patent it had been discovered that a large portion of the wire through which the current returned to the battery might be dispensed with, by plunging into the earth the two ends of wire which would have been joined by the part left out. The electric current, it was discovered, would pass from one end of the wire to the other, and so complete the circuit as effectually as if a continuity of wire had been kept up. A circuit on this principle would not be wholly metallic; it would be so in its greater part, and in all that part which contained the coils, and operated on the needles by which signals were given. Now, the patentees by the specification do not make any claim to metallic circuits; what they claim is, improvements in giving signals by means of electric currents transmitted through metallic circuits; and the improvements, as appears by the specification, consist entirely in methods and instruments for using the electric currents, assuming it to be transmitted by means open to the public, and in respect of which the patentees make no claim. The circuit used by the defendants is metallic in all that part which operates in giving signals, and in all the parts to which the plaintiffs' alleged improvements apply; and it is no condition necessary to the existence of the improvements, that the circuits should be metallic in any other part than that which contains the coils and operates on the needles; and there is no doubt that the patentees might, without any alteration of the description of their invention as contained in the specification, have removed all color for this objection, if they had used words, in speaking of the transmission of the current, which could not be contended, as those now used are, to be applicable only to currents through circuits wholly metallic. The objection in question may be considered as it regards the specification, and as it regards the title of the patent. With regard to the specification, it is to be observed, that, the claims of the patentees being for improvements not at all immediately connected with or dependent on each other, but all applicable to giving signals, &c., by means of electric currents, the plan adopted in the specification was, to give an account of the whole system or mode of transmission of electric currents for the purpose of giving signals, and the modes of giving those signals, specifying afterwards the parts claimed as improvements, and neither expressly disclaiming or leaving unclaimed all that was not expressly claimed. It is obvious, that, in such a specification, that part which describes the matter claimed is to be much more strictly construed than that which, though necessarily mentioned, is not spoken of as a new matter, or as the subject of a grant, but only as something known, and necessary to be referred to, for the purpose of explaining the claim. Considered in this view, we think the specification, in speaking of metallic circuits, may properly be considered as comprehending all circuits which are metallic as far as it is material to the improvements claimed that they should be so, and that the expression in question is not to be construed with more strictness and precision than is necessary to enable it to fulfil that purpose of explanation for which it was introduced. With regard to the use of the words "metallic

circuits" in the title of the patent, it was urged that the patentees, by using those words, would mislead a person who was in possession of improvement identical with the plaintiffs', but which he intended to use in giving signals by non-metallic circuits, and who might have opposed the grant of a patent of a more comprehensive title, but would acquiesce in one confined to metallic circuits; but it appears to us, that whatever ought to be the case, supposing currents transmitted in the manner used by the defendants to have been known at the time of granting the patent, or of giving notice of the application for it, that the title did in the actual circumstances of the case, that is to say, the earth circuit not being publicly known, give sufficient notice to any person secretly acquainted with that discovery, or thinking it probable that some such discovery might be made, and having also invented improvements like those of the patentees, to put him on his guard, and on an inquiry how far the proposed patent might interfere with him. It appears to us reasonable to hold, that a claim for a patent for improvements in the mode of doing something by a known process, is sufficient to entitle the claimants to a patent for his improvements, when applied either to the process as known at the time of the claim, or to the same process altered and improved by discoveries not known at the time of the claim, so long as it remains identical with regard to the improvements claimed and their application.

The second objection was not less extensive than the first; and would allow the full use of all the patentees' improvements, supposing them to be used only in such an apparatus as the defendants used. That objection was, in substance, that the plaintiffs' patent was for a system of giving signals by means of several wires, and converging needles pointing to letters, whereas the defendants have used one wire, and had made signals by counting the deflections of a needle or needles, which was found by the jury to be a different system from that of the plaintiffs. This objection appears to us to be founded on a wrong construction of the specification, which, we think, shows the patent not to be for a system of giving signals, but for certain distinct and specified improvements, comprehending those now in question, *the system* being described only for the purpose of explaining the improvements claimed. Another objection somewhat connected with that last mentioned was urged for the defendants, that the breaches in the declaration being that the defendants had used and counterfeited *the invention* of the patentees, was not supported by evidence of the use or counterfeiting of part only; but, on looking at the specification, which explains what the invention is, it appears to consist of nine specified improvements, and the declaration in speaking of the "said invention" is to be considered as if it charged the using, &c., of the nine improvements, and is sufficiently proved by showing that one of them has been used.

It appears to us, therefore, that none of the objections which apply to both grounds on which the plaintiffs claim the verdict in respect of the vertical needles and of duplicates at intermediate stations ought to prevail. With respect to the objection before adverted

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to, as to the claim to the verdict regarding vertical needles, on considering the finding of the jury with regard to the defendants' instrument, in conjunction with the claim in the specification, (the first claim above set out,) and taking, as we are bound to do on the present inquiry, the finding of the jury to be correct, it may be doubtful whether the plaintiffs can claim the verdict on this ground. But it appears to us that the use of duplicate apparatus at intermediate stations, which the jury has found to be a new invention, and which was undoubtedly used by the defendants, entitles the plaintiffs to retain their verdict. There was, indeed, an objection particularly applying to this part of the case which it is proper to mention. It was insisted that the giving of duplicate signals at intermediate stations was not the proper subject of a patent, being an idea or principle only, and not a new manufacture; but we think that the patentees not only communicated the idea or principle that duplicate signals might be given, but showed how it might be done, i. e., by duplicate apparatus at each station, and that this is the fit subject of a patent. It was, indeed, contended that it was obvious and self-evident that a circuit having a distant coil could have intermediate ones also, which would operate in the same manner; but it appears to us, that though it might be probable *a priori* that such would be the case, it was matter of experiment that it could practically be done, and that the invention of the patentees, though simple, was one for which a patent might be granted. If, as was mentioned on the argument, the defendants have enabled the intermediate stations to send as well as to receive communications, it is a very important improvement, for which the inventor may probably be entitled to a patent, though he may not be entitled to use it, unless by the license of the patentees of the less perfect invention, on which their own is grounded. For these reasons, we think that the rule must be discharged.

Rule discharged.

LUCAS v. BEALE.¹

Easter Term, April 15, 1851.

Parties — Joint Contract — Amendment — New Trial.

The plaintiff, acting on behalf of the members of an orchestra, to which he himself belonged, signed a proposal, "on behalf of the members of the orchestra," to continue their services, provided the defendant would guaranty certain salary then due to them. The defendant accepted this proposition, but failed to pay the salary due. The plaintiff alone brought an action, for the whole money due to himself and the rest, and stated the contract to be with himself and the rest. The jury found that he acted on behalf of himself as well as the rest:—

Held, that the contract was joint, and that he could not recover.

The judge at the trial offered the plaintiff's counsel leave to amend, which was refused by

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him, owing to the strong opinion expressed by the judge that the contract was a joint contract:—

Held no ground for a new trial.

Assumpsit. The declaration in the first count stated that the plaintiff with others had been performers in the orchestra at the Royal Italian Opera House, Covent Garden; that 1280*l.* were due to the plaintiff and the others in respect of their performances for thirteen nights; that thereupon, in consideration that the plaintiff and the others would continue their services to the end of the season, the defendant promised the plaintiff to pay the plaintiff and the others at, &c., on, &c., the said 1280*l.*; that he, the plaintiff, and the others continued their services to the end of the season. Breach, non-payment of the said 1280*l.* The second count stated the promise to be to pay the said 1280*l.* to the plaintiff and the others, and to make payments in respect of such performances of the plaintiff and the said others subsequent to the time of the promise, on the 10th and 25th days of August then next. Breach, non-payment for subsequent performances of the plaintiff and the others. The third count was for work and labor.

Plea — *Non assumpsit.*

At the trial, before Jervis, C. J., at the sittings after Hilary term in Middlesex, it appeared that the plaintiff and several others, being performers in the orchestra at the opera, Covent Garden, had a claim against the defendant for thirteen nights' salary, and that negotiations took place in the greenroom of the theatre, the plaintiff acting on behalf of himself and the other performers; and that the following documents were there signed:—

“July 9, 1849.

“The gentlemen of the orchestra, &c., are willing and hereby pledge themselves to continue their services and attend their duties, provided Mr. Beale will guaranty the payment of the thirteen nights due on the 5th ult. (Signed on behalf of the gentlemen of the orchestra.)

C. LUCAS.”

“July 9, 1849.

“Mr. Beale will accept the proposition made by Mr. Lucas, on behalf of the gentlemen of the orchestra, and he will appoint the treasury to be open on the 19th inst. to pay the thirteen nights due on the 5th inst., and he pledges himself to open the treasury on the 10th and 25th of August to make further payments.

J. F. BEALE.”

The plaintiff and the others performed three nights after the 9th of July, when the defendant gave up the theatre, and the principal singers went on with the management of it. Neither the arrears for the thirteen nights, nor the salary for the three subsequent nights' performances, had been paid.

At the end of the plaintiff's case, it was objected, that the contract laid in the declaration and proved was a joint contract, and the plaintiff could not recover alone. The jury, in answer to a question

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of the learned judge, found that the plaintiff signed the contract on his own behalf as one of the performers; but the learned judge directed a nonsuit, after offering leave to the plaintiff to amend the declaration, by stating the contract as a separate contract with each of the performers, which was refused.

Keating now moved for a new trial. In this case the plaintiff was the real contracting party, and was entitled to sue as trustee for the others. If it were the case of an instrument under seal, there would be no doubt upon the matter. *Metcalf v. Rycrofte*, 6 M. & S. 75.

[*Jervis*, C. J. If Lucas is the contracting party, an action must lie against him if one of the orchestra should refuse to play.

Cresswell, J. He is not a trustee, but an agent, for the others.]

If he was not a trustee for the whole, this was at all events a separate contract with him for payment of his share, and he was entitled to sue for that.

[*Cresswell*, J. Then the contract should have been stated as a separate contract with him. Leave to amend was offered, but refused.]

The strongly-expressed opinion of the learned judge rendered an amendment useless at the trial; but if the court now think that the plaintiff can recover for his own share, upon a declaration properly framed, a new trial ought to be granted.

CRESSWELL, J. I think that there is no ground for disturbing this nonsuit. This is not a contract made by Lucas as a contracting party, but a contract made by others through him as their agent. As to the question of amendment, the plaintiff has designedly put his own construction on the contract. It is too much to ask us to grant a new trial because he refused to amend, so as to raise a case which he did not at the trial think it worth his while to raise.

WILLIAMS, J. I am of opinion that the nonsuit was right. I think it would be a dangerous thing to grant a new trial on the ground that the plaintiff refused an amendment, which would then have been allowed, because the judge expressed a strong opinion that he ought to be nonsuited.

TALFOURD, J., and *JERVIS*, C. J., concurred.

Rule refused.

 Ambrose v. Kerrison.

AMBROSE v. KERRISON.¹

Easter Term, April 16, 1851.

Baron and Feme — Wife's Funeral — Undertaker employed by Volunteer — Liability of Husband.

When a wife dies, [although living separate from her husband,] her husband is bound to provide her with a funeral at a reasonable expense; and if he does not do so, any person who voluntarily employs an undertaker and pays him for performing such a funeral, is entitled to recover the sum so expended from the husband, in an action for money paid.

DEBT for money paid on account of the funeral of the defendant's deceased wife, and on an account stated.

Plea — Never indebted.

At the trial, before Parke, B., at the Spring assizes for Essex, it appeared that the defendant and his wife were married in the year 1820, but that they had been living separately for many years; Mrs. Kerrison, during her life, had the interest of 4000*l.* to her separate use, which, upon her death, in January, 1850, went to her husband. At her death, attempts were made, without success, to find out the defendant; and a Mr. Gale, a friend of Mrs. Kerrison's, being also acquainted with the defendant, interested himself about the funeral, and informed the plaintiff that he would certainly be remunerated. Before her death, Mrs. Kerrison had frequently expressed a desire to be buried in the family vault at Kelvedon in Essex. The plaintiff, after communicating with Mr. Gale, employed an undertaker to conduct the funeral and remove the body to Kelvedon, and expended upon the whole 23*l.* 13*s.* for the expenses of the funeral, removal of the body to Kelvedon, burial fees, &c. The defendant had paid 12*l.* 1*s.*, but it did not appear for which part of the expenses incurred that sum was paid. The action was brought to recover 11*l.* 12*s.*, the residue of the sum expended by the plaintiff. The counsel for the defendant contended that the plaintiff could not recover in an action for money paid, being a mere stranger, on whom no duty was cast to provide for the funeral; and that the defendant was not liable, his liability for necessities supplied to his wife having ceased with her death, and the executor, if any one, being the party liable. The learned judge, on the authority of *Jenkins v. Tucker*, 1 H. Black. 90, told the jury that the defendant was liable to provide for the funeral of his deceased wife, and that if he did not provide for it, the law would imply a request on his part to all the world to provide for it on his credit, at a reasonable expense according to the condition of the husband. The jury found for the plaintiff for the amount claimed, 11*l.* 12*s.*

Montagu Chambers now moved for a rule for a new trial on the ground of misdirection. *Jenkins v. Tucker*, upon which the learned

¹ 20 Law J. Rep. (n. s.) C. P. 135.

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judge acted in directing the jury, is distinguishable from this case. In that case, the husband and wife had been residing together previously, so that she had, during her life, apparent power to pledge his credit. The husband had only left her for a time to go abroad, and left her with that power. There, too, the father of the wife was the person who paid the expenses of her funeral, and the judgment appears to proceed on that ground. Lord Loughborough says, "A father also seems to be the proper person to interfere in giving directions for his daughter's funeral in the absence of her husband." There is no decision that a mere volunteer may recover. Even if the undertaker could recover, it does not follow that the party employing him stands in the same position. Moreover, the plaintiff in this case appears to have trusted to the credit of Gale, who told him he would be paid.

[*Cresswell, J.* There is no promise on the part of Gale that he would pay him.]

It is not disputed that if the defendant is liable for any part of the amount expended by the plaintiff, he is liable for the whole.

JERVIS, C. J. I think that there ought to be no rule in this case. It is admitted, on the part of the defendant, that if there is a legal liability at all upon him to pay the expenses of the funeral, no question can be fairly raised by him as to the reasonableness of the amount expended. We are not, therefore, discussing whether the sum expended upon the removal to Kelvedon was part of the reasonable and necessary expenses of the funeral, or not. That being so, the point is whether the husband is liable for the expenses incurred by a third party hiring an undertaker and paying him for the decent interment of the wife. Now, there is no question that if an undertaker voluntarily and without employment buries any person, that person's executor, with assets clearly, perhaps without assets, is liable to repay the undertaker for the expenses so incurred. That is because it is the duty of an executor to perform that last service, and common decency and a regard for the health of others require that it should be performed by some one. The same reason which makes an executor liable to an undertaker, under those circumstances, without any special contract, would cast a similar liability upon the husband of a deceased wife, and compel him, without any special contract, to repay an undertaker performing her funeral at a reasonable expense. Nor do I see any difference between the case of an undertaker, and that of a third party who pays the undertaker. The undertaker himself cannot do every thing in person; he employs other persons, some to make the coffin, others to bear the pall, and so forth. In the present case, the plaintiff employs the undertaker, and I am of opinion that he is entitled, though a volunteer, to recover against the husband just as much as the undertaker, acting voluntarily, would have been so entitled.

CRESSWELL, J. I am of the same opinion. Whatever remarks may be made on one or two observations of the learned judges in

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the case of *Jenkins v. Tucker*, I think that that case is rightly decided; and I adopt the expression of Heath, J., "The defendant was clearly liable to pay the expenses of his wife's funeral." I also think that a volunteer, employing and paying an undertaker to conduct the funeral, is entitled to recover the expenses so incurred from the husband.

WILLIAMS, J. I think that *Jenkins v. Tucker* governs the present case.

TALFOURD, J., concurred.

*Rule refused.*¹

BODEN v. FRENCH.²

Easter Term, May 5, 1851.

Contract — Construction — Words "Net Cash."

The defendant, a coal factor, sold coals for the plaintiff upon the following authority: "Please sell for me 250 tons of coal at such a price as will realize me not less than 15s. per ton, net cash, less your commission:" —

Held not to support a declaration for breach of contract in not selling for ready money. The meaning of such a contract is, "Sell for me, so as to have ready money forthcoming to me on the day of sale to the amount of 15s. per ton."

ASSUMPSIT. The declaration stated that, in consideration that the plaintiff, at the request of the defendant, would retain and employ the defendant as a coal factor, to sell certain coals on account of the plaintiff for reasonable reward, the defendant promised the plaintiff that he would not sell and dispose of the said goods and chattels otherwise than for ready money, and that he would render to him a true account of the sale thereof within a reasonable time; that the plaintiff, confiding in the said promise, did employ the defendant as such factor to sell the said goods upon the terms aforesaid; and the defendant accepted such employment. Breach, in selling the said goods otherwise than for ready money, to wit, at two months' credit.

Pleas — *Non assumpsit*, and other pleas. Issues thereon.

At the trial, before Jervis, C. J., at the sittings in London, after Hilary term, the following letter from the plaintiff to the defendant was put in evidence: —

¹ In *Chapple v. Cooper*, 13 Meeson & Welsby, 252, (1844,) it was held that a widow was bound to pay for the funeral expenses of her deceased husband, *which she had expressly ordered*, although she was at the time an infant; and *Alderson, B.*, there said, "The decent Christian burial of

a man's wife and lawful children, who are the *personæ conjunctæ* with him, is a personal advantage and reasonably necessary to himself; and then the rule of law applies, that the husband, though an infant, may make a binding contract for such burial."

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"London, Sept. 26, 1850.

"Mr. French:

"Sir, — Please sell for me 250 tons of anthracite coal now lying at Neale's Wharf, Blackfriars, and belonging to me, at such a price as will realize me not less than 15s. per ton net cash, less your commission for such sale.

H. BODEN."

It appeared that the defendant, who was a commission agent, had sold the coals for 15s. 6d. per ton, at a two months' credit. It was also proved that the custom of the coal trade was to give two months' credit for coals. The learned judge was of opinion that the letter did not bear the construction put upon it in the declaration, and nonsuited the plaintiff, with leave to move to enter a verdict for the plaintiff for 75l.

A rule having been obtained accordingly, —

Dowdeswell and *Bramwell* (May 5) showed cause. The question is, whether the defendant, under the instructions given in the letter of the 26th of September, was absolutely bound to sell for ready money, and had no option. This was a mercantile contract, and is to be construed with reference to the known usage of trade, which in this case was to sell at two months' credit. *Wigglesworth v. Dalison*, 1 Smith's Lead. Cases, 299, and the cases there cited. In fact, the coals were sold for 15s. 6d. a ton, which is 15s. a ton "net cash," with 6d. discount, which is a fair discount for two months.

[*Jervis*, C. J. The letter is capable of several constructions; it may be either 15s. ready money, or what will be equivalent to 15s. ready money when realized.]

If the meaning is doubtful, the verdict ought not to be entered for the plaintiff.

Byles, Serj., and *Gray*, in support of the rule. The document of the 26th of September is an order to sell for ready money only. The very meaning of the word "cash," in ordinary parlance, implies money in hand. Johnson's Dict. "Cash." In *Eddison v. Collingridge*, 19 Law J. Rep. (N. S.) C. P. 268, the words "credit in cash" were held to be equivalent to "pay."

[*Cresswell*, J. There is no doubt that "cash" means "money," but in this case it is to be "realized," — what does that mean? When is he to have it as money?]

If the true construction is not that which the plaintiff contends for, the word "cash" is altogether useless. The construction contended for by the defendant must be either that the sale is to produce a sum at a distant date equal to 15s. cash; or that he is to sell on credit, but to pay the plaintiff cash; or that he is to sell for 15s. net at some time or other, which drops the word "cash" altogether. But all these constructions are contrary to the plain meaning of the words, which contemplated a sale for ready money, realizing 15s. per ton

net; and this is the only mode of construing them so as to give a meaning to every word.

[*Cresswell, J.* Suppose the defendant had sold for a two months' bill at 15s. 6d. per ton, and had himself discounted that bill so as to realize to the plaintiff 15s. per ton, could the plaintiff have sued him for a breach of contract? It would depend upon whether the letter means "you shall sell for cash," or "you shall place me in cash."]

It is submitted that the contract would be broken by not selling for ready money.

[*Williams, J.* If it means that he is to sell not necessarily for ready money, but so as to have ready money forthcoming to the plaintiff, is any breach proved?]

An action would lie in this case equally whether he had the money forthcoming or not.

JERVIS, C. J. The rule must be discharged. At the trial, it occurred to me that the contract was, at least, of a very doubtful nature, and that the plaintiff had not made out that the authority given by the letter was to sell only for ready money. After the discussion which has taken place as to the meaning of the document, I am still of the same opinion. In the course of the argument, it was almost admitted that there were at least four constructions besides that contended for by the plaintiff, in favor of all of which much might be urged. Now, it was for the plaintiff to make out that the construction adopted in the declaration was the true one, and if it still appears doubtful, he cannot have a verdict entered for him. The case is somewhat analogous to a case tried at Chester, in which the jury said that the contract produced was quite unintelligible, and it was held that the judge was right in saying that the plaintiff had not made out the construction put upon it in the declaration. A plaintiff is bound to make out his case as stated in the declaration, and he fails to do this if he leaves it doubtful. If, however, it were necessary to put a construction upon this document, I do not think that it shows such a contract between the parties as that laid in the declaration, but a different contract. I think that the real meaning is, "Sell for me, as a coal factor, 150 tons of coal; but sell them so as to have for me available at the time of sale 15s. per ton cash." That construction does not support the declaration. I, therefore, think that the nonsuit was right.

CRESSWELL, J. I am of the same opinion. The plaintiff, by his declaration, undertakes to construe this obscure document. He alleges that the defendant undertook to sell the coals for ready money, and that he did sell "otherwise than" for ready money, a somewhat unusual allegation. Now, the authority given to the plaintiff by the letter of the 26th of September, was this: "Please sell for me 250 tons of coal at such a price as will realize me not less than 15s. per ton net cash." We hear this, at least, that the defendant was a commission agent; it is, therefore, the more probable that the parties contracted with reference to some known usage

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of the trade. Now, it is clear that by the usage of this trade a commission agent may sell without making the vendee pay ready money to the vendor, and if there is any custom by which a commission agent pays ready money to his principal, although selling on credit, that would be the kind of contract into which the defendant would, I think, be entering here. But that is not the kind of transaction upon which the plaintiff relies in his declaration. I think, therefore, that the declaration does not properly set out the contract, and that the rule must be discharged.

WILLIAMS, J. The plaintiff has failed to convince me that the document has such a construction as to support the declaration. I think that the defendant would fulfil his duty, though he sold on credit, if he had the money forthcoming to the plaintiff at the proper time.

TALFOURD, J., concurred.

Rule discharged.

SOUTHALL v. RIGG. — FORMAN v. WRIGHT.¹

Easter Vacation, May 13, 1851.

Promissory Note — Plea of No Consideration — Evidence — Note obtained by innocent Misrepresentation of Law.

A plea to an action on a promissory note alleging "that the note was given without consideration," and stating "that it was obtained from the defendant upon a representation by the plaintiff that a sum of money was owing from the defendant to the plaintiff by virtue of an indenture, whereas no such sum was owing," is a good plea of no consideration, without alleging that the representation was made "fraudulently," or that it was a representation of a matter of fact.

Such a plea, with the addition of the word "fraudulently" in the statement of the misrepresentation, is sufficiently proved by a finding that the note was given upon the faith of an innocent misrepresentation of a matter of law by the plaintiff, and the word "fraudulently" may be rejected as surplusage.

ASSUMPSIT on a promissory note for 50*l.*, dated the 19th of March, 1850, made by the defendant, payable on demand, and delivered by him to the plaintiff.

Pleas — First, that there never was at any time existing any value or consideration whatever for the making, delivery, or payment, by the defendant to the plaintiff, of the said promissory note, or for the payment of the said sum or any part thereof, and that the defendant made and delivered the same note to the plaintiff, (without there having been, and with this that there never was, any value or consideration whatever existing for the making, delivery, or payment, by the defendant of the said promissory note,) to wit, for the accommodation of the plaintiff. Verification.

¹ 20 Law J. Rep. (N. S.) C. P. 145.

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Second, fraud and covin of the plaintiff and others.

Replication, to both pleas, *de injuria*.

At the trial, before Talfourd, J., at the sittings in London, in Hilary term, the second plea was abandoned, and the question turned upon the first issue. It appeared that the defendant was entitled, under a will which had formed the subject of a suit in chancery, to a share amounting to 34*l.* per annum, and that a Mrs. Newman had been appointed to receive the shares of the defendant and his brothers, and to take care of them and their affairs. In 1844, the defendant, being then fourteen years old, was, with the consent of Mrs. Newman and at his own desire, bound apprentice to the plaintiff, a water-gilder, and it was agreed by all parties and reported by the master in chancery to be proper, and stipulated by the indenture of apprenticeship, that 50*l.* premium should be paid to the plaintiff, and that the dividends to arise from time to time on the defendant's share should be paid to the plaintiff, and that in consideration of the 50*l.* by Mrs. Newman, and of the dividends, the plaintiff was to provide the defendant with food, &c. It was represented at the time to the plaintiff, by Mrs. Newman, that the dividends amounted to 34*l.* per annum, and Mrs. Newman informed the plaintiff that, if the dividends fell short of that amount, the difference would be made up to him when the defendant came of age. On the 24th of February, 1850, the term of apprenticeship expired. During that term, the plaintiff had received all the dividends which had arisen upon the defendant's share, but they had amounted to a considerably less sum than at the rate of 34*l.* per annum, the deficiency being 77*l.* in the whole. On the 16th of March, 1850, the defendant, who had then just come of age, went to the plaintiff's house, and was there, in the presence of the plaintiff, told by Fisher, who was the clerk to the solicitor in the suit in chancery, that he was bound to pay the difference, upon which the defendant gave the plaintiff a note for the 77*l.* On the 19th, the defendant was advised that he had done wrong in giving the note; upon which he again went to the plaintiff; and after some conversation, the plaintiff said he would be content with a note for 50*l.*, upon which the defendant gave him the note which was the subject of the present action, and the note for 77*l.* was destroyed.

Upon this evidence it was contended that the plea was not proved, inasmuch as the want of consideration alleged in the plea bound the defendant to show that the bill was an accommodation bill. The counsel for the defendant applied for leave to amend, which was granted, and the plea was then amended by striking out the words "for the accommodation of the plaintiff," and by inserting in their place the following: "For that the same was obtained from the defendant by the plaintiff upon a representation heretofore, to wit, on the day and year last aforesaid, made by the plaintiff to the defendant that there was then due and owing from the defendant to the plaintiff a large sum of money, to wit, the sum in the said note specified, as and for the deficiency in the amount of certain dividends payable to the plaintiff under and by virtue of a certain indenture of apprenticeship heretofore, to wit, on, &c., made between the plaintiff and

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the defendant. Whereas, in truth and in fact, no such sum of money or any part thereof was ever due and owing by the defendant to the plaintiff as aforesaid or otherwise." The plea having been so amended, the learned judge directed a verdict for the plaintiff, giving the defendant leave to move to enter a verdict, if the court should be of opinion that the verdict ought to have been found for him upon the plea as amended, and upon the facts proved. It was agreed that the court should be at liberty to draw such inferences of fact as a jury might have drawn.

A rule having been obtained accordingly, in Hilary term, —

Byles, Serj., and *J. Brown*, (April 16, 23,) showed cause. The defendant was obliged to state the circumstances showing a want of consideration for this note. *Atkinson v. Davies*, 11 Mee. & W. 236; s. c. 12 Law J. Rep. (n. s.) Exch. 169. The plea of accommodation having failed, this amendment is made, and the main question is, whether the amended plea with the facts proved contains an answer to the action. This question must be decided in the negative. In the first place, the note for 77l. was not given without consideration. Mrs. Newman had made herself liable to pay the deficiency in the dividends, by her expression that it would be made up when the defendant came of age. The debt of third parties is a sufficient consideration for a promissory note. *Baker v. Walker*, 14 Mee. & W. 465; s. c. 14 Law J. Rep. (n. s.) Exch. 371. So is the giving up a doubtful claim. *Longridge v. Dorville*, 5 B. & Ald. 117. But supposing that the note for 77l. was given without consideration, still the destruction of that note might be a good consideration for the second note. It was a negotiable note, and, at all events, of more value than the paper in *Haigh v. Brooks*, 10 Ad. & E. 309; s. c. 9 Law J. Rep. (n. s.) Q. B. 99; s. c. in error, 10 Ad. & E. 323.

[*Williams*, J., referred to the case of *Chapman v. Black*, 2 B. & Ald. 588.]

That was the case of a bill given in lieu of a prior bill affected by usury. The consideration of the second bill was held to be usurious as well as that of the first. But that differs from a note given without consideration.

[*Jervis*, C. J. A man gets a bill of exchange without consideration, and that bill is given up, and a renewed bill given upon consideration of giving up the first bill. Is that a good consideration? It would be very convenient for fraudulent parties if it were.]

The moral obligation under which the defendant here lay was a sufficient consideration for the first note. But the material part of this plea, according to *Atkinson v. Davies*, is the part which states affirmatively what are the circumstances showing that there was no consideration for the note, and that part is not supported by the evidence. In the first place, there is no representation by the plaintiff to the defendant; the representation relied upon was made by Fisher. Secondly, it was true that a sum was due and owing from the defendant to the plaintiff, under the verbal arrangement between the plaintiff and Mrs. Newman. Thirdly, the note was

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obtained, not upon any representation at all, but by destroying the former note.

[*Jervis*, C. J. The question is, What, in fact, induced the defendant to make this second note? The evidence shows that it was obtained upon a representation that something was due to the plaintiff. That is a fact stated in the plea. You cannot say that one note was given in satisfaction of the other. It is all one transaction. The facts prove the plea, whether the misrepresentation is one of law or of fact.]

Assuming the plea to be proved, this is only an innocent misrepresentation of law, and affords no answer to the action. "*Ignorantia juris non excusat*" is a maxim applicable to this case. *Broom's Maxims*, 2d edit. p. 190. *Brisbane v. Dacres*, 5 Taunt. 143. *Bilbie v. Lumley*, 2 East, 469. In such a case as this, if the defendant had paid the money, a court of equity would not relieve him. *Maddock's Chancery Practice*, 3d edit. p. 96. At all events, the plea as amended is bad on special demurrer; it does not state that the transaction alleged was the only consideration. Therefore, this was an amendment which ought not to have been made.

Butt and Ball, (April 23,) in support of the rule. The case of *Bury v. Blogg*, 12 Q. B. Rep. 877; s. c. 18 Law J. Rep. (N. S.) Q. B. 57, is an answer to the last objection, even if this plea were objectionable on special demurrer. But the plea is good in form and substance. The evidence is amply sufficient to prove all the material part of the plea. *Shearm v. Burnard*, 10 Ad. & E. 593; s. c. 8 Law J. Rep. (N. S.) Q. B. 261. In *Hay v. Ayling*, 20 Law J. Rep. (N. S.) Q. B. 171, s. c. 3 Eng. Rep. 416, it was held that a plea alleging that the bill declared upon was given in consideration of a bet, was proved by evidence that it was given in renewal of a prior bill, which prior bill had been given in consideration of a bet.

[*Jervis*, C. J. In another case, of *Forman v. Wright*, (in which a rule has been obtained,) it was held by Lord Campbell, at *nisi prius*, that in order to make a good plea of no consideration to an action on a note obtained by a false representation of the plaintiff, the representation must have been *fraudulently* made. We must consider that case before we give our opinion.]

FORMAN v. WRIGHT.¹

DEBT. First count on a promissory note for 33l. 6s. 10d., payable on demand, made by the defendant, on the 7th of November, 1849, and delivered to the plaintiff. Second count on an account stated.

Pleas—First, to the first count, denial of the making of the note. Issue thereon.

¹ 20 Law J. Rep. (N. S.) C. P. 148.

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Second, to the first count as to 21*l.* 11*s.* 11*d.*, parcel, &c., that as to that sum the defendant, before the commencement of the suit and before the making of the note in the first count mentioned, to wit, &c., was indebted to one William Fawcett in a certain sum of money, to wit, the sum of 10*l.*, 14*s.* 11*d.*, and no more, for the price and value of goods by the said William Fawcett before then sold and delivered to the defendant, and that the said William Fawcett, to wit, &c., died intestate. That before the making of the said supposed promissory note in the first count mentioned, and before the commencement of the suit, and after the death of the said William Fawcett, to wit, on, &c., letters of administration of the goods and chattels of the said William Fawcett were duly granted to one Elizabeth Fawcett. That the plaintiff, after the death of the said William Fawcett, and after the granting of the said letters of administration, and before the making of the said note in the said first count mentioned, and before the commencement of this suit, to wit, on, &c., was duly appointed agent of the administratrix, Elizabeth Fawcett, to act on her behalf in respect of such administration. That the plaintiff, being such agent as aforesaid, before the making of the said note, and before the commencement of this suit, *fraudulently*, deceitfully and falsely represented to the defendant, that there was due from the defendant to the said William Fawcett before and at the time of his death, and was then and still is due to the administratrix of the said William Fawcett, the sum of 32*l.* 6*s.* 10*d.* And the plaintiff then demanded of, and by means of such representation as aforesaid induced and prevailed upon the defendant to make and deliver, and the defendant did then make and deliver to the plaintiff the said note in the first count mentioned, as and for the payment and discharge of the said sum so alleged to be due as aforesaid to the said William Fawcett in his lifetime, and to the said Elizabeth Fawcett after the death of the said William Fawcett. That so far as relates to the sum of 21*l.* 11*s.* 11*d.*, part of the said sum of 32*l.* 6*s.* 10*d.*, in that count mentioned, there never was any value or consideration whatever for the making and delivery of the said promissory note to the plaintiff; and that the plaintiff then held and always held and still holds the same, as far as relates to the sum of 21*l.* 11*s.* 11*d.*, without any value or consideration whatever. Verification.

Third, to the first count, payment into court of 10*l.* 14*s.* 11*d.* in satisfaction of the residue.

Fourth, to the first count, fraud and covin.

Other pleas to the second count, on which nothing turned.

Replication to the second plea, *de injuria*.

At the trial, before Lord Campbell, C. J., at the Maidstone Spring assizes, the jury, in answer to a question of the learned judge, found that 10*l.* 14*s.* 11*d.* was all that was due, and that the note was obtained by the false representation of the plaintiff that the whole amount was due; but that that representation was made under a mistake, and *without any fraud*. Upon this finding the learned judge directed the verdict to be entered for the plaintiff, with liberty to the defendant to move to enter a verdict for him.

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Montagu Chambers (April 17) having obtained a rule accordingly, —

Bramwell (May 13) showed cause. The plea was not supported by the finding of the jury. Fraud was of the essence of the plea. The mere statement that the note was given without consideration would not be sufficient.

[*Williams, J.* Would it not be enough to state that there was no consideration, in that the note was given under a mistake? *Darnell v. Williams*, 2 Stark. 166.]

The word "fraudulently" here must be read together with the other words, and shows that they do not mean a mere mistaken representation. The principle of *noscitur a sociis* applies. The jury, therefore, do not find the state of facts alleged in the plea as showing want of consideration, even if the facts they find would be sufficient to show want of consideration. Moreover, if the allegation of fraud is struck out, no allegation remains that the defendant believed, or was influenced by, the representation.

[*Cresswell, J.* The plea says, that the plaintiff by means of the representation induced the defendant to make the note.]

The representation in this case may have been merely a misrepresentation of a legal liability. *Stevens v. Lynch*, 12 East, 38.

[*Williams, J.* That was a case in which the drawer of a bill, though discharged by time given to the acceptor, was held liable upon an express promise to pay, founded on a mistake of law. That is a very different case.]

If the allegation of fraud is left out, this may be a mere misrepresentation of law, in which case the money could not be recovered back. There is no case which decides that such a plea is an answer to an action on a bill or note. *Bell v. Gardiner*, 4 Man. & G. 11; s. c. 11 Law J. Rep. (N. S.) C. P. 195, was the case of a mistake of fact.

Montagu Chambers, (*Horn* with him,) in support of the rule. This is a plea of partial failure of consideration. Fraud is not the essence of the plea. All the words alleging fraud might be struck out of the plea, and a good defence would remain. The finding of the jury, therefore, is a sufficient finding for the defendant upon the issue raised on this plea. The partial failure of consideration consists in the circumstance that the bill was obtained by a misrepresentation of the amount of the defendant's liability. There are no cases precisely in point; but some cases relating to adjustments on policies of insurance are analogous. In those cases it has been held, that where there has been a misconception either of the law or facts upon which an adjustment has been made, the underwriter is not bound by the adjustment. *Hogg v. Gouldney*, Park on Insurance, 8th edit. p. 266. *Rogers v. Maylor*, Ibid. p. 267; and *Herbert v. Champion*, 1 Camp. 134. (He was then stopped by the court, who gave judgment in both cases.)

JERVIS, C. J. I think that the rule in this case of *Forman v. Wright* must be made absolute. The jury find that innocently there

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was a misrepresentation by the plaintiff to the defendant that more than 10*l.* 14*s.* 11*d.* was due, and that the defendant was induced by that misrepresentation to give the note declared upon. The plea alleges that the plaintiff fraudulently, deceitfully, and falsely represented to the defendant that more than 10*l.* 14*s.* 11*d.* was due. The question is, whether the finding substantially proves the plea. It is clear that it does not, unless the plea would be good after striking out the words "fraudulently and deceitfully." If, in stating the grounds of a partial want of consideration, it would be sufficient to state that the note was obtained by any misrepresentation, whether of law or fact, going to the amount of the consideration, the plea would be good without those words. On consideration, I apprehend that a plea alleging a failure of consideration may be supported as well by showing that the note was obtained by a misrepresentation of law as by a misrepresentation of fact. *Prima facie* a bill or note imports consideration; and it is not sufficient in a plea alleging want of consideration to say only that there was no consideration, but the circumstances which show that there was no consideration must be stated. Now, suppose that a man, with a perfect knowledge of the law and facts applicable to the case, gives a note without consideration, he has a defence to an action upon that note. In stating the circumstances he might say, "I added up an account, and erroneously supposed that 100*l.* was due, whereas, in fact, only 10*l.* was due;" that would be a defence of no consideration except as to 10*l.* How does that case differ from the present, before the matter has been completed by payment? What the defendant here says is, "I was induced by the plaintiff, acting as the personal representative of William Fawcett, deceased, to give him the note for the whole amount, and gave the note, thinking, from a mistake of law, that I was liable to that amount, whereas I was only liable for 10*l.*" The test must be directed to the amount of the consideration. I think that a plea alleging a representation innocently false of a matter going to the amount of the consideration would not be a bad plea, though the matter misrepresented might be a matter of law, and that the finding of the jury here supports the plea, after rejecting the words "fraudulently and deceitfully."

The same principle will govern the decision of *Southall v. Rigg*. In that case the action was brought on a promissory note. The plea, as originally framed, stated that there was no consideration for the note, and that the note was given for the accommodation of the plaintiff. It turned out upon the evidence that that was not the case, but that the defendant had given the note upon a representation by the plaintiff that he was liable to pay a certain sum of money, which was not the case. Upon this there was an application to amend, and an amendment was made stating that the note was obtained upon a representation made by the plaintiff to the defendant that there was due from the defendant to the plaintiff the sum of money in the note mentioned as the deficiency of certain dividends payable to the plaintiff under an indenture of apprenticeship; whereas no such sum was ever owing. On the discussion of that rule, it was left to the court to say whether, on the plea as amended, and upon the evidence, the

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defendant was entitled to the verdict. It appears from the evidence to have been truly stated in the plea that it was represented by the plaintiff to the defendant that he was liable to pay the money, whereas he was not; and that on the faith of that misrepresentation he made the note; and inasmuch as the plea would be good, if it had expressly alleged that the misrepresentation had been upon a matter of law, we think there was no objection to the amendment being made. It was said that there might have been a debt of honor, which would have formed a sufficient consideration. But the answer is, that it was not in fact given for that consideration. It was also said that the note in question was given in consideration of a note for a larger amount being given up. But that was not the real transaction; the second note was not given by way of a compromise for the first; it was all one transaction. If the first note was void, the second would be clothed with all the liabilities of the first, and would be also void. In this case also the rule must be made absolute.

CRESSWELL, J. I entirely agree. As to the case of *Forman v. Wright*, the plea is substantially a plea of absence of consideration to a certain amount. The view we now take does not interfere with the doctrine, that a small consideration may sustain an extensive promise; but where there is a promise to pay a certain sum, all being supposed to be due, as here, each part of the money expressed to be due is the consideration for each part of the promise, and the consideration as to any part having failed, it is, *pro tanto*, *nudum pactum*. The rules of pleading require that, in an action on an instrument importing consideration, it should not only be alleged in the plea that there was no consideration, but that it should be shown how. Here it is shown in this way: the plea alleges that the note was obtained by a representation of the plaintiff that 34*l.* was due; it goes on to say that that representation was fraudulent. Now, whether fraudulent or not, it was admitted to be wrong. That is enough. Whether the representation was one of law or fact matters not. The note was obtained upon a misrepresentation as to part of the consideration, and the consideration failed for so much. The decision of *Southall v. Rigg* is involved in that of *Forman v. Wright*.

WILLIAMS, J. I consider the plea in question to be a plea pleaded to part of the declaration, and containing an averment that so far as that part is concerned the note declared upon was without consideration. That averment is accompanied by circumstances showing a want of consideration for the note *pro tanto*. In order to make such a plea good on special demurrer, the words "fraudulently and deceitfully" are not necessary, nor is it necessary to prove the allegations contained in them. All the other averments in the plea being proved, I think the defendant is entitled to have this rule made absolute. I take the same view of the plea in *Southall v. Rigg*.

TALFOURD, J., concurred.

Rule absolute to enter a verdict for the defendant in both cases.

 Booth v. Clive.

BOOTH v. CLIVE.¹

Easter Term, April 23 and 24, 1851.

Notice of Action—9 & 10 Vict. c. 95—Acting in Pursuance of Statute—Disobeying Prohibition—Contingent Assessment of Damages—New Trial.

The act 9 & 10 Vict. c. 95, s. 138, enacts, that in all actions to be commenced against any person for any thing done in pursuance of that act, notice in writing of such action shall be given to the defendant one month before action brought.

In the case of an action brought against the judge of one of the county courts established under that act, for disobeying a writ of prohibition, in proceeding with a matter therein referred to, such judge is entitled to notice under the above section if he proceeded honestly, believing that his duty as a judge under the act called upon him to do so.

Where the jury have found a verdict for the defendant, with leave given to the plaintiff to enter a verdict for a sum at which his damages have been contingently assessed at the trial, the court will not afterwards grant a new trial in order that there may be a fresh assessment of damages, unless the plaintiff's counsel has objected to such contingent assessment at the trial.

CASE. The second count stated, that before and at the time, &c., the defendant was the judge of an inferior court of record, to wit, the Southwark County Court of Surrey, in which court a judgment had been recovered against the plaintiff in a cause wherein W. G. Still was plaintiff, and the plaintiff was defendant. That before and at the time, &c., to wit, on the 26th of February, 1850, a writ of prohibition had been duly issued out of Chancery, prohibiting the judge of the said court, and also the clerk and high bailiff and officers thereof, from proceeding or carrying into execution, or in any wise giving effect to or proceeding upon the said judgment, which said writ the plaintiff, to wit, on the 26th of February, 1850, caused to be made known to the defendant as judge of the said county court, and then caused a copy thereof to be left with the defendant, and it then became the duty of the defendant as such judge to refrain from proceeding or carrying into execution, or in any wise giving effect to or proceeding upon the said judgment according to the tenor and effect of the said writ. Yet the defendant, not regarding his duty in that behalf, and intending to injure the plaintiff, did not refrain from proceeding upon the said judgment, but, on the contrary, maliciously and without reasonable and probable cause made an order founded upon the said judgment, that the plaintiff should be committed for one month to Horsemonger Lane jail, for neglecting to pay 2*l.* alleged to be due and payable by the plaintiff for and in respect of two instalments of the said debt and costs recovered by the said judgment. Special damage by reason of the imprisonment on such order.

Pleas—First, not guilty; second, that the grievances in the declaration mentioned were committed by the defendant after the passing of the act 9 & 10 Vict. c. 95, and were and each of them was done in pursuance of the said act, and by the defendant acting in execution

¹ 20 Law J. Rep. (N. S.) C. P. 151. 15 Jur. 563.

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of the said act; and that no notice in writing of this action and of the cause thereof was given to the defendant one calendar month before the commencement of the suit, pursuant to the said statute. Verification.

There were several other pleas, which it is not necessary to set out.

Replication to the second plea, that the said grievances in the declaration mentioned were not, nor was either of them, done in pursuance of the said act. Issue thereon.

At the trial, before Jervis, C. J., at the sittings after Hilary term for Middlesex, it appeared that an order had been duly made by the defendant for payment by the plaintiff of the debt and costs recovered by a judgment of the Southwark County Court against him. He had afterwards been discharged by the Insolvent Court in respect of all debts mentioned in his schedule, including the judgment in question. Part of the debt and costs still remaining unpaid, the defendant refused to discharge his original order; whereupon the plaintiff obtained a writ of prohibition from the Petty Bag office, which was served upon the defendant, who refused to obey it, and made the order mentioned in the declaration for the committal of the plaintiff for non-payment of the remaining instalments due in respect of the judgment. No notice of the action had been given to the defendant. The lord chief justice, in summing up, told the jury that, if the defendant in proceeding upon the judgment acted under the *bona fide* belief that his duty as judge of the county court made it incumbent upon him to do so, notwithstanding the prohibition issued out of the Petty Bag office, the act done by him must be considered as done in pursuance of the County Courts Act; and that he was entitled to notice of action. And, being pressed to leave to the jury the further question, whether the defendant *reasonably* believed it to be his duty to proceed, he told them, that if *reasonably* meant any thing else than "in good faith," it meant "according to his reason," as contradistinguished from caprice. The jury found a verdict for the defendant, but at the suggestion of the lord chief justice assessed the damages of the plaintiff contingently, which they found to be 40s.; and leave was given to the plaintiff to move to enter a verdict for that amount.

Humfrey, April 23, moved for a new trial.

[*Cresswell*, J. The leave was, to move to enter a verdict for the 40s. contingently assessed. The court will not grant a new trial in order to enable you to recover larger damages, unless you objected to the contingent assessment. *Morrish v. Murrey*, 13 Mee. & W. 52; s. c. 13 Law J. Rep. (n. s.) Exch. 261.]

Then the verdict ought to be entered for 40s. The question is, whether the grievances complained of were done in pursuance of the act 9 & 10 Vict. c. 95. The words are, (sect. 138,) "And for the protection of persons acting in execution of this act, be it enacted, that all actions to be commenced against any person for any thing done in pursuance of this act shall be laid and tried in the county wherein the fact was committed, &c., and notice in writing of such

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action and of the cause thereof shall be given to the defendant one calendar month at least before the commencement of the action." The defendant, therefore, was only entitled to notice of action if he acted in pursuance of the act. Now, the test whether he was acting in pursuance of the act is, whether he reasonably believed that his duty under the act was to proceed. And it was a misdirection in the learned judge not to leave the question of reasonable belief to the jury. It may be admitted that the defendant really believed he was acting in pursuance of the act; but the question is, Did he reasonably so believe? That is a question which must vary with reference to the position, talents, age, and education of the person acting, which are all subjects for the consideration of the jury.

[*Williams, J.* Surely a judge acts reasonably if he acts *bona fide*, and really thinks that a prohibition does not bind him, and goes on to try a cause believing that it is his duty to do so.]

He then cited the following cases: *Hughes v. Buckland*, 15 Mee. & W. 346; s. c. 15 Law J. Rep. (N. S.) Exch. 233. *Ireson v. Harris*, 7 Ves. jun. 251. *Horn v. Thornborough*, 3 Exch. Rep. 846; s. c. 18 Law J. Rep. (N. S.) Exch. 349. *Wedge v. Berkeley*, 6 Ad. & E. 663; s. c. 6 Law J. Rep. (N. S.) M. C. 86. *Hopkins v. Crowe*, 4 Ibid. 774. *Kine v. Evershed*, 10 Q. B. Rep. 143; s. c. 16 Law J. Rep. (N. S.) Q. B. 271. *Bevan v. Prothesk*, 2 Burr. 1151.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court. A great many cases were mentioned yesterday by Mr. Humfrey, in which the right to notice of action has been discussed; and at first sight it seems difficult to reconcile all the expressions used by the judges in dealing with those different cases. But upon examination, the difficulty is rather seeming than real, and arises from the circumstance that language used by the judges with reference to the particular cases then before them has been afterwards quoted, and used generally. Thus, in some cases, we find judges saying that the party claiming notice of action, because the act imputed to him was done in a particular character or in the exercise of some particular authority, did such act, either having or not having reasonable ground for believing that he filled that character or had that authority, where it is manifest that the meaning of the words used by them is, that the party must, according to the evidence, be assumed to have acted under, or without, the *bona fide* belief that he filled the character or had the authority then in question. In other cases the judges have said that the real question is, whether the party believed so and so, and acted under that belief. Now, although there is a difference in the terms used, there is no difference in the principle laid down in these cases; and we think that the true principle by which we must be guided in disposing of this application is this: Did the defendant proceed in the cause, honestly believing that his duty as judge, under the County Courts Act, called upon him to do so? The last case on the subject, *Horn v. Thornborough*, illustrates the view above taken of the whole series of authorities. There, a reversioner caused a party to be apprehended under the Malicious Trespass Act, 7 & 8

Geo. 4, c. 30. Trespass was brought against him, and he pleaded not guilty "by statute." No notice of action was given. The Court of Exchequer held that he was entitled to notice of action, provided he *bona fide* believed that he was acting in pursuance of the statute; which is strictly in accordance with the ruling in the present case. It is remarkable that Parke, B., mentions *Hughes v. Buckland* as a decision that the protection afforded by the statute then under consideration is extended to all persons who have a *bona fide* belief that they fill the character mentioned in the statute, and act *bona fide* under that belief. But *Hughes v. Buckland* was pressed upon us by Mr. Humfrey, as an authority for holding that *bona fide* belief will not suffice, unless it is founded upon reasonable grounds. Rolfe, B., in his judgment, alludes to the use of the word "reasonable" in the former case, and explains it as being an ingredient in enabling the court to arrive at a conclusion as to the *bona fides*; and it does not appear to have been used in any sense at variance with this by the Court of Queen's Bench, in *Kine v. Evershed*. The defendant there was attorney to the mortgagee of a house, of which the plaintiff was the tenant, and gave the plaintiff into custody on a charge of wilfully damaging the house. The learned judge who tried the cause asked the jury whether the defendant acted *bona fide* in apprehending the plaintiff, or whether the charge was colorable. They found that he acted *bona fide*; whereupon the learned judge directed a nonsuit. The court, in giving judgment on a rule for a new trial, observed, "The jury were asked whether the defendant acted *bona fide*, or whether, on the other hand, his proceeding was malicious and colorable, no question having been put to them as to his being the servant of, or having authority from, the mortgagee, or reasonably believing himself to be in either of these positions;" and ultimately the court held that "they should have been asked not only as to the *bona fides* of the defendant, but as to his reasonable belief that he was servant of or had the authority of the mortgagee." Now, the *bona fides* there meant is the *bona fides* upon which the jury had been asked their opinion, viz., whether it was an honest charge, as opposed to a colorable charge; and the *reasonable* belief afterwards mentioned is equivalent to *bona fide* belief that he was servant or had authority; and that makes the case consistent with the opinion of the Court of Exchequer in *Horn v. Thornborough*, and with many earlier decisions, such as *Wedge v. Berkeley*. The case of *Hopkins v. Crowe* is not at variance with this view of the subject. The statute 5 & 6 Will. 4, c. 59, gave authority to the owner of a horse to give in charge a person guilty of cruelty towards it. The defendant was the son of the owner of a horse that had been ill used, and gave the party in charge. It was held that he must be taken to know the law; viz., that the owner was the party authorized, and that he had not, and could not have, any reasonable ground for believing himself to be the owner, and therefore was not protected. There the absence of all reasonable ground for such belief was a sufficient ground for holding that he did not act under that belief, and a *bona fide* belief that he was owner was necessary, to give him the statutory protection.

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We, therefore, think that the direction of the lord chief justice was right, and ought not to be disturbed, and the plaintiff can have no rule.

Rule refused.

COLBOURN & others v. DAWSON.¹

Easter Term, April 29, 1851.

Guaranty — Several Documents — Past or future Consideration — Ambiguity — Parol Evidence — Variance.

Plaintiffs wrote to defendant, "We are doing business with B., and require a guaranty to the amount of 200*l.*, and they refer us to you." Defendant wrote in answer, "I have no objection to become security for B., and subjoin a memorandum to that effect." The memorandum subjoined was, "I hereby engage to guaranty to Messrs. Colbourn, iron masters, 200*l.* for iron received from them from B. as annexed:" —

Held, that these three documents were to be read together, and that the words "we are doing business," taken with the rest, showed that the consideration for the defendant's undertaking was that the plaintiffs should continue to supply B. with goods; and that there was therefore a good consideration.

Per Jervis, C. J. If the last document alone had constituted the contract, parol evidence would have been admissible to construe the words "for iron received."

The declaration alleged, that in consideration that the plaintiffs, at the request of the defendant, would deliver certain iron to B. on credit, the defendant promised to guaranty to the plaintiffs the price of the said iron to the amount of 200*l.*: —

Held, that there was no variance; that the promise was to be looked at apart from the consideration; that assuming the guaranty to contain a promise to guaranty to the plaintiffs the price of iron supplied, it also contained a promise to guaranty the price of iron to be supplied, and that the plaintiff was not bound to state the whole of the promise, but only the part for the breach of which he sued.

ASSUMPSIT. The first count of the declaration stated that in consideration that the plaintiffs, at the request of the defendant, would sell and deliver certain goods and chattels, to wit, 1000 tons of iron, to one Joseph Baker and one William Baker, on certain credit then agreed upon by and between the plaintiffs and the said Joseph and William Baker, the defendant then promised the plaintiffs to guaranty to them the price of the said goods and chattels to the amount of 200*l.*; that although the plaintiffs, confiding in the said promise of the defendant, did *afterwards* sell and deliver to the said Joseph and William Baker 1000 tons of iron on the credit aforesaid, at and for a reasonable price, amounting, to wit, to the sum of 200*l.*, of which said several premises the defendant then had notice; and although the said credit and time for payment of the said price of the said goods and chattels had elapsed, and although the said Joseph and William Baker were afterwards requested by the plaintiffs to pay them the said sum of 200*l.*, and although the said Joseph and William Baker have not paid the said sum of 200*l.*, or any part thereof, of which said last-mentioned several premises the defendant had notice,

¹ 20 Law J. Rep. (N. S.) C. P. 154. 15 Jur. 680.

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and was then requested by the plaintiffs to pay them the said sum of 200*l.*, yet the defendant has not paid the said sum of 200*l.*, or any part thereof.

Pleas — *Non assumpsit*, and other pleas, upon which issues were joined.

At the trial, before Lord Campbell, C. J., at the Gloucester Summer assizes, 1850, a verdict was entered for the plaintiffs for 92*l.*, subject to the opinion of the court on the following special case:—

On the 24th of November, 1848, Messrs. J. & W. Baker were indebted to the plaintiffs in the sum of 59*l.* 8*s.* 7*d.* for certain quantities of iron sold and delivered by them to Messrs. Baker between the 11th of October, 1848, and the 24th of November, 1848. On the last-mentioned day the plaintiffs wrote to the defendant the following letter:—

“Mr. Thomas Dawson:

“Sir,— We are doing business with Messrs. Baker of Wolverhampton, and we require a guaranty to the amount of 200*l.*, and they refer us to you for one. Trusting you will not fail to furnish us,

“We remain, &c.,

“COLBOURN & Co.

“November 24th, 1848.”

To this letter the defendant replied on the 27th, by sending a letter and document, of which the following is a copy:—

“Derby, Nov. 27th, 1848.

“Gentlemen,— In reply to yours of the 24th instant, I beg to say that I have no objection to become security for Messrs. Baker of Wolverhampton, and subjoin the following memorandum to that effect:—

“200*l.* I hereby engage to guaranty to Messrs. Colbourn, iron masters, the sum of two hundred pounds *for iron received* from them for Messrs. Baker, as annexed.

“THOMAS DAWSON.”

After the receipt of the foregoing letter and document, and upon the faith of its being a good guaranty, the plaintiffs supplied Messrs. Baker at various times with iron, amounting in the whole to 92*l.* The last delivery was on the 5th of February, 1849. After the 5th of February, 1849, and before the commencement of this action, Messrs. Baker became bankrupt. At the time of commencing the action the sum of 124*l.* was still due from Messrs. Baker for the iron sold by the plaintiffs to them.

If the court should be of opinion that the letter and document of the defendant, signed by the defendant, and dated the 27th of November, 1848, constitute a guaranty for so much of the debt of Messrs. Baker as was incurred after the 27th of November, 1848, and that they prove the first issue, then the verdict for the plaintiffs for the sum of 92*l.* was to stand. Otherwise, the verdict was to be entered for the defendant.

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Keating, (*Kettle* with him,) for the plaintiffs. The words used in the guaranty "for iron received" are ambiguous, and may be explained by parol evidence, so as to show that a security for iron to be afterwards received was intended to be given. The words in "consideration of your having this day advanced" were allowed to be explained as contemplating a future advance in *Goldshede v. Swan*, 1 Exch. Rep. 154; s. c. 16 Law J. Rep. (n. s.) Exch. 284. So the words "in consideration of your having resigned" in *Steele v. Hoe*, 19 Law J. Rep. (n. s.) Q. B. 89. Then, looking at the letter of the 24th of November, in answer to which the guaranty was sent, it is apparent that a security for future receipts of iron by Messrs. Baker was contemplated. The words "we are doing business" and "we require a guaranty" evidently show that the consideration for the security was to be a continuance of the business. He also referred to *Haigh v. Brooks*, 10 Ad. & E. 309; s. c. 9 Law J. Rep. (n. s.) Q. B. 99; in error, 10 Ad. & E. 323, *Edwards v. Jevons*, 8 Com. B. Rep. 436; s. c. 19 Law J. Rep. (n. s.) C. P. 50; *Butcher v. Stewart*, 11 Mee. & W. 857; s. c. 12 Law J. Rep. (n. s.) Exch. 391; and *Mayer v. Isaac*, 6 Ibid. 605; s. c. 9 Law J. Rep. (n. s.) Exch. 225.

Crompton, (*Gray* with him,) for the defendant. The words of this guaranty are not ambiguous. In all the cases cited the words used included the word "having," which was consistent with a concurrent act being contemplated; but there is no case going so far as to decide that "received" means "to be received."

[*Cresswell*, J. Suppose the letter which contained the application for a guaranty were to state, "we are prevented from doing business with A. B. until we have a guaranty from you," and in answer to that, a guaranty, referring to the letter, were sent "for all iron received by A. B." ought not that guaranty to be construed prospectively?]

Admitting that the guaranty must be construed with reference to the letter of the 24th of November, there is nothing to show that a future advance of iron is contemplated. At most it amounts to a promise to secure the plaintiffs to the amount of 200*l*, when the whole sum supplied both before and afterwards shall have reached that amount. If so, the plaintiffs cannot succeed upon this declaration, which states the promise to be to secure the plaintiffs in respect only of iron to be advanced afterwards to the amount of 200*l*. There is a clear variance. But it is impossible to collect from these documents what was the consideration; and on that ground the guaranty is void. *Bell v. Welch*, 19 Law J. Rep. (n. s.) C. P. 184. *Bentham v. Cooper*, 5 Mee. & W. 621; s. c. 9 Law J. Rep. (n. s.) Exch. 114.

Kettle replied.

*JERVIS, C. J. I am of opinion that in this case the plaintiffs are entitled to the judgment of the court. If it were necessary to confine our decision to the paper on which the guaranty is written, I think that the argument for the plaintiffs has sufficiently shown that we might in construing the words of that guaranty look to the

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knowledge of the parties at the time in order to ascertain the meaning of the words, "for iron received." I can see no difference between receiving parol evidence to construe those words, and receiving it to construe the words "having released" in *Butcher v. Stewart*, or the words "having advanced" in *Goldshede v. Swan*, where evidence was admitted to show that a past advance was not contemplated; but it is unnecessary to consider whether this is purely a question of law for the court or not; for, as I understand the case, we need not refer to any authorities upon that subject at all. It is admitted that if these documents all refer to one another, they must all be read together as constituting the contract, and be explained one by the other. Now, it is clear that they do all refer to each other; the last paper is this, "I hereby engage to guaranty to Messrs. Colbourn 200*l.* for iron received from them for Messrs. Baker, as annexed," that is, "I, on behalf of Messrs. Baker, undertake as in the paper annexed." That paper when referred to appears to refer to the application made to the defendant, which is this, "We are doing business with Messrs. Baker, and we require a guaranty for 200*l.*, and they refer us to you for one." The result of the whole is, "As you are doing business, and in consideration of your doing business with Baker & Co., I guaranty you 200*l.* for iron received." What is doing business? It means doing and continuing to do business; that is, continuing to supply goods for the future. That being so, there is a good consideration. We must then look to see what is the promise. The promise is, "I guaranty you 200*l.* on account of iron received;" that is, either for goods already supplied, or for goods to be supplied in future. It, therefore, involves a liability for both. The party is not bound in declaring upon such a guaranty to state the whole promise. He here says, "In consideration of my supplying goods, you promised to guaranty me 200*l.* for goods to be supplied afterwards;" he is not bound to say "for goods supplied before *and* afterwards." I think, therefore, that the plaintiffs are entitled to judgment.

CRESSWELL, J. I am of the same opinion. If the consideration and the promise are contemplated apart from each other, all difficulty vanishes. The plaintiffs, in their letter, allege that they are doing business with Baker & Co., and that as they are doing business with them, they require a guaranty for 200*l.*, (that is, *because* they are doing business,) and they state that Baker & Co. refer them to the defendant. The defendant's answer is that he has no objection, and he subjoins a memorandum containing the guaranty in question. The effect of the transaction is that he says in the guaranty, "In consideration of your doing business as at present, I guaranty you 200*l.*, not for any existing amount, but generally for business transactions." All this is apart from the promise. What, then, is the promise? "I guaranty 200*l.* for iron received as annexed," which probably means, as in my letter on the other side mentioned; that is, as general security to the amount of 200*l.* Whether such a guaranty would include goods formerly supplied is immaterial; it undoubtedly

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includes goods to be thereafter supplied. Therefore, I think that the consideration sufficiently appears; that it is a valid consideration; and that the promise alleged in the declaration is supported by the proof.

WILLIAMS, J. Looking at these documents, I think it appears with reasonable certainty, without doing more violence than the authorities warrant to the strictly grammatical construction of the words, that this was a continuing guaranty to the amount of 200*l*.

TALFOURD, J. I think it is not to be taken for granted that the word "received" is used in a past more than in a future sense. It is an elliptical expression. Looking at all these documents, I cannot doubt that in this case if it has a past, it has also a future signification.

Judgment for the plaintiffs.

HAMBER v. HALL.¹

Easter Term, May 6, 1851.

Insolvency — Assignees — Liability — Messenger.

A creditor's assignee in insolvency under 5 & 6 Vict. c. 116, s. 1, and 7 & 8 Vict. c. 96, s. 4, is not liable for the messenger's fees, except upon an express contract.

ASSUMPSIT for work and labor, money paid, money had and received, and on an account stated.

Plea. — *Non assumpsit*.

At the trial, before Jervis, C. J., at the sittings after Michaelmas term, 1850, a verdict was taken for the plaintiff for 259*l*. 10*s*. and interest, subject to the opinion of the court upon a special case, which contained the following statements: —

The plaintiff was, on the 26th of May, 1847, and had ever since been, a messenger of the Court of Bankruptcy in London, attached to the court of Mr. Commissioner Goulburn. The defendant was a solicitor and banker at Ross, in Herefordshire, carrying on the business of a solicitor in partnership with Mr. Minnett, under the firm of "Hall & Minnett." On the 26th of May, 1847, John Mathewman presented a petition for protection from process to the said Court of Bankruptcy in London, and that petition was duly allotted to Mr. Commissioner Goulburn. On the 27th of May, 1847, George Green was duly appointed official assignee of the estate and effects of the said John Mathewman under the said petition, and so continued until his death on the 21st of October, 1849. On the 10th of November, 1849, William Pennell was duly appointed official assignee in the stead of the said George Green, and so continued until the plaintiff was discharged from possession as hereinafter mentioned.

¹ 20 Law J. Rep. (N. S., C. P. 157. 15 Jur. 682.

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On the 12th of June, A. D. 1847, the defendant, who was a creditor of the said John Mathewman, was duly chosen and appointed creditors' assignee of the estate and effects of the said John Mathewman under the said petition; he duly accepted such appointment, and has ever since been and acted as creditors' assignee. On the 27th of May, A. D. 1847, the plaintiff, as such messenger as aforesaid, by virtue of a warrant under the hand and seal of the said commissioner, directed to the plaintiff, as such messenger, duly seized and took possession of certain goods and effects in and upon a certain colliery belonging to the said John Mathewman, or wherein he was interested, situate at Oaken and Churchway Levels, St. Briavel's, in the Forest of Dean, and by himself and assistants had and retained possession of the said goods and effects until he was discharged from such possession on or about the 4th of March, A. D. 1850. The said John Mathewman had no other property besides his goods and effects before mentioned and his interest in the said colliery. The said petition is now filed of record, and remains in full force and effect in the said Court of Bankruptcy. A final order in the matter of the said petition was made on the 1st of April, A. D. 1848. The plaintiff's bill of charges and disbursements as such messenger under the said petition has been taxed by the proper officer of the Court of Bankruptcy, and allowed at the sum of 259*l.* 6*s.* 9*d.* Of this sum, 251*l.* 7*s.* 3*d.* is due in respect of services subsequent to the date of the defendant's appointment as assignee. The residue is in respect of services before the date of such appointment. No assets have ever been received by the official assignee or by the defendant out of the estate of the said John Mathewman. The defendant never was upon the colliery, nor did he ever interfere with the said plaintiff, or with his possession of the said colliery, or the goods and chattels of the aforesaid John Mathewman thereon, except so far, if at all, as the same may be inferred from the correspondence and affidavit set out in the case.

[It is unnecessary to set out the correspondence, which only proved that the defendant knew that the plaintiff was acting as messenger and had correspondence with him concerning the estate.]

The question left for the opinion of the court was, whether the plaintiff was entitled to recover the whole or any, and if any, what part of his bill, and whether with or without interest; and if the court should hold him so entitled, the verdict was to be entered for such amount as the court should direct; if not, the verdict for the plaintiff was to be set aside and a nonsuit entered.

Lush, for the plaintiff. The question in the case is, whether the creditors' assignee is liable to the messenger under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, as the assignee in bankruptcy was before the passing of those acts, and the 1 & 2 Will. 4, c. 56. The authorities clearly show the liability of the assignee in bankruptcy, before the act of 1 & 2 Will. 4. In *Burwood v. Felton*, 3 B. & C. 43; s. c. 2 Law J. Rep. K. B. 204, it was admitted that the assignee was liable for the messenger's fees incurred after his appointment. In

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Hamber v. Purser, 2 Cr. & M. 209; s. c. 3 Law J. Rep. (N. S.) Exch. 2, it was held that the messenger could recover from the assignee for the costs of advertising a meeting of creditors, and for the hire of the room in which the meeting was held, without proof that the assignee had employed him or expressly recognized him as messenger. Lord Lyndhurst said there, that the assignee must have been cognizant of what was done by the plaintiff as messenger. Although the messenger was appointed by the commissioners, the assignees could remove him, which shows that they had perfect dominion over him. *Robson v. Jonassohn*, 7 Man. & G. 351; s. c. 13 Law J. Rep. (N. S.) C. P. 132. The cases in equity are to the same effect. In *Ex parte Hartop*, 9 Ves. 109, where a commissioner of bankruptcy was superseded for fraud, the assignees, who were not privy to the fraud, and had received no effects, were held liable to the messenger for expenses incurred since their appointment.

[*Jervis*, C. J. In *Hamber v. Purser*, Bayley, B., says that the plaintiff's claims "must have been within the knowledge of the assignee; and if he did not prohibit the messenger from incurring them, he is liable." What date is to be fixed in this case for the commencement of the defendant's liability?]

The date of his appointment. It is submitted that it is the duty of the assignee in insolvency, as it was in bankruptcy, to get possession of the property, to manage, and to realize it. It is true there is no case on the subject since the Bankruptcy Act which appointed official assignees, but that appointment can make no difference, as the creditors' assignees have still to manage and to realize the estate, and pay over the money to the official assignee. By the Bankruptcy Act, 1 & 2 Will. 4, c. 56, s. 22, official assignees are appointed, and one is to be assignee of each bankrupt's effects, together with the creditors' assignees, and all personal estate, and the rents of real estate; and the proceeds of sale of real and personal estate are to be "possessed and received" by the official assignee alone; and there is a proviso that, before the appointment of the creditors' assignees, the official assignee is to be deemed to all intents the sole assignee of the bankrupt's estate and effects. The only words which create any difficulty are the words "possessed and received." The proviso clearly shows that the creditors' assignees have some special duties; and it is submitted that the duty of taking care of the property primarily rests upon them.

[*Cresswell*, J. It is material to construe the 22d and 25th sections together. The 22d section says that the personal estate and effects shall be possessed by the official assignee alone; and the 25th says that such estate and effects shall vest in the assignee or assignees for the time being. Therefore, the estate is vested in both official and creditors' assignees. So, if the order of the two sections be reversed, the property is to be vested in both kinds of assignees, and the possession in the official assignee only.]

By the Insolvency Act, 5 & 6 Vict. c. 116, s. 1, the estate and effects of the petitioner are, on the presentation of the petition, to become vested in the official assignee, who may forthwith take possession

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of so much as can be obtained without suit, and is to hold and stand possessed of the same in like manner as official assignees under the Bankruptcy Act. The 7th section vests the whole estate, real and personal, after the passing of the final order, absolutely in the official assignee and the creditors' assignee. The subsequent act of 7 & 8 Vict. c. 96, s. 4, makes a little difference. The property is thereby vested in the assignee or assignees for the time being; but it is enacted that the property shall be possessed and received "by the official assignee alone," without saying that he shall take possession.

[*Cresswell, J.* But that excludes the possession of the creditors' assignee.]

By the 10th section the official assignee may act alone until the appointment of a creditor's assignee, and he may sell property by order of the commissioner. The necessity for the commissioner's order shows that he had not complete dominion over the property.

[*Cresswell, J.* It is quite consistent that the possession may be in one, and the power of sale in another.]

By the 13th section of the 5 & 6 Vict. c. 116, the judges had power to make rules and regulations, among other things, as to the duties of the assignees, and they made orders accordingly on the 1st of November, 1842. In bankruptcy, the creditors' assignees generally deal with the property; and it was competent for the judges to order that the creditors' assignee in insolvency should look after the estate.

[*Jervis, C. J.* Yes, as agent for the official assignee. After all, the case resolves itself into a question of contract.]

[*Cresswell, J.* Can you imply any authority from the defendant to the plaintiff, unless the plaintiff has been discharging some duty for the defendant?]

There is a difference between the cases of real and personal property. The official assignee is to take only the profits of the real estate, and not to take possession of it. The order to the messenger would come from the creditor's assignee, and not from the official assignee; and the defendant might have repudiated his liability for the plaintiff's act of which he was cognizant.

[*Cresswell, J.* Could the defendant have removed the plaintiff?]

It is submitted that he could.

Channell, Serj., for the defendant. The creditors' assignee is not liable. The question is one of contract, and there is no evidence whatever of a contract between the plaintiff and the defendant. All the cases on the subject, at law and in equity, were decided previously to the stat. 1 & 2 Will. 4, c. 56, and before any such person as the official assignee existed. Although at some time the property may vest in the two assignees, yet the right of possession is always in the official assignee. There is no evidence in the case to show that the messenger was in possession at the request of the creditors' assignee, but much to show the contrary. The employment of the messenger was under a warrant of the court, with which the defendant had nothing to do. The other side must show that the defendant is liable, whether he had assets or not. Next, with regard

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to the effect of the insolvency statutes, 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96. The effect of the 1st section of the former statute was under the consideration of the Court of Queen's Bench in *Sayer v. Dufaur*, 11 Q. B. Rep. 325; s. c. 17 Law J. Rep. (N. S.) Q. B. 50, which decided that the right of action is in the official assignee, and not in the petitioner, after petition and before final order. The meaning of the first section of the act is to give the official assignee possession of the property, although on the appointment of the creditors' assignee the property for some purposes is vested in them jointly. The 7 & 8 Vict. c. 96, does not repeal, but amend, the former act, and the provision of the 4th section is to be taken in conjunction with the preceding statutes.

Lush, in reply.

JERVIS, C. J. I am of opinion that the defendant is entitled to judgment. Although it is asserted generally in the text books that the assignees are liable at law for the services of the messenger, there is no authority to that effect since the statute of William, and every case will be found to have resolved itself into a question of contract. Under the old law, when the assignees were entitled to all the property, it was their duty to receive, administer, and manage the property, and if they found a man in possession, and knew he was doing acts which they were bound to do, that became in fact a recognition of those acts which it was their duty to do, and an adoption of them. But in this case there was no evidence of any express contract. The messenger was employed by the official assignee, and it is contended that that was with the knowledge of the present defendant. But the question now arises, When we are called upon to imply a contract, what are the duties of a trade assignee? The question is on the construction of the 5 & 6 Vict. c. 116, s. 1, and the 7 & 8 Vict. c. 96, s. 4, and also the 1 & 2 Will. 4, c. 56, s. 22, which is referred to by later statutes. What, then, is the effect of the act of 1 & 2 Will. 4, c. 54? It provides, that whereas formerly an assignment was necessary, the adjudication without any assignment vests the property in the official and creditors' assignees, but the personal property is to be in the possession of the official assignee. The trade assignee is not in possession, and receives nothing. Now, it is contended that he is to pay without assets. How could it be that the trade assignee is to pay first and then to have an action for money had and received? There is no express contract in the case, and no implied one, because the messenger was not doing an act which the trade assignee was liable to perform.

CRESSWELL, J. I am of the same opinion. The action is for work and labor done for the defendant at his request. Now, undoubtedly, there was no express promise to pay; and the question is, whether one is to be implied. In the first place, if the work had been done for the defendant, and had been sanctioned by him, a promise would be implied. But there is no other sense in which it could be said that

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the work was done for him, except the matter was one which he was obliged to do personally or by agent. Was the defendant then bound to keep possession of the goods? The law says that is to be done by the official assignee. In the next place, what is there to show that the work was done at the defendant's request? It seems to me that it cannot be said either that the work was done for the defendant, or at his request.

WILLIAMS, J. I am of the same opinion. There is no evidence of an express or implied employment of the messenger by the defendant. Bearing in mind the duties to be performed, I find nothing to show that the messenger was employed on the retainer of the defendant.

TALFOURD, J. I am entirely of the same opinion. I find that in this case the plaintiff was in possession before the appointment of the defendant. I further find that the defendant did not interfere, except as stated in the correspondence.

Nonsuit to be entered.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER.

FROM AND AFTER HILARY TERM, 14 VICT., A. D. 1851.

REIMER *v.* RINGROSE.¹
Hilary Vacation, February 26, 1851.

Insurance — Corn free from Average — Total Loss.

Where corn is insured free from average, and, in consequence of injury sustained by the ship, is damaged in the voyage and taken out at an intermediate port during the repairs of the ship, there is not a total loss, unless the corn is in such a condition that the expense of bringing it to the port of destination for sale would exceed the value of it when brought; and it is not a proper question to leave to the jury, whether the insured had acted as a prudent uninsured owner would have acted under the circumstances.

ASSUMPSIT, on a policy of insurance on corn insured in the usual way free from average, on a voyage from Dantzic to Hull.

At the trial, before Alderson, B., at the York Spring assizes, 1850, it appeared that in the course of the voyage the vessel sustained considerable damage, and in consequence put into a port in Norway. The corn was taken out to allow the ship to be repaired, and was found to be much damaged, and was therefore sold in Norway instead of being brought to Hull. At the trial, the defendant had a verdict, on the ground that there was not a total loss, and a rule had been obtained by Martin, in Easter term, 1850, for a new trial for an alleged misdirection, against which cause was shown² by

Watson and Hoggins, and

Willes and *Unthank* were heard in support of the rule; but the facts not being agreed upon, the case stood over for the purpose of

¹ 20 Law J. Rep. (N. S.) Exch. 175.

² November 22, before PARKE, ALDERSON, and PLATT, BB.

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enabling the court to determine whether there were any grounds for the rule. The following cases were cited: *Navone v. Haddon*, 19 Law J. Rep. (n. s.) C. P. 161. *Roux v. Salvador*, 3 Bing. N. C. 266; s. c. 7 Law J. Rep. (n. s.) Exch. 328. *Moss v. Smith*, 19 Law J. Rep. (n. s.) C. P. 225. *Anderson v. Walkis*, 2 M. & S. 240. *Mordy v. Jones*, 4 B. & C. 394; s. c. 3 Law J. Rep. K. B. 250. *Thompson v. The Royal Exchange Assurance Company*, 16 East, 214. *Freeman v. The East India Company*, 5 B. & Ald. 617. *Arnould on Insurance*, 1052 *et seq.* *Knight v. Faith*, 19 Law J. Rep. (n. s.) Q. B. 509.

Cur. adv. vult.

The judgment of the court was now delivered by

ALDERSON, B. In this case, which was tried before me at the last Spring assizes at York, the question that was argued here was, whether or not I had omitted to leave a point to the jury which was material to the issue which ought to have been determined. It was an action on a policy of insurance, and the question before the court was, whether the plaintiff made out that he was entitled to recover as for a total loss. It was an insurance upon grain, and in the course of the voyage the vessel had sustained considerable damage by sea, and in consequence of it the vessel was obliged to put into a port in Norway. The cargo of corn, being then partially damaged, was taken out for the purpose of enabling the parties to repair the ship and continue the voyage. The question before the court at *nisi prius* mainly made was, whether or not this loss was a total or an average loss; because, in consequence of a memorandum usually contained in all policies of insurance with respect to corn, if there be only an average loss the party cannot recover at all for it, but if it be a total loss they can. The question therefore arose, whether there was or was not a total loss, and whether the damage sustained by the corn in the course of that voyage was such that, if the voyage had been continued, the corn would have arrived in England in the port of Hull in a state in which it would have been corn or rubbish, so to speak. That point was left to the jury, and determined in favor of the defendant; that is to say, it was in such a state of damage that with reasonable and proper care it might have been brought home and sold as damaged corn when it arrived in Hull, and in short it was a mere average loss, for that was the point.

But there was another point made at *nisi prius*, and which was, whether or not it was a total loss in case a party uninsured would have conducted himself as a reasonable man in the way in which the plaintiff had conducted himself; that is to say, instead of bringing home the corn in a damaged state, and putting himself to expense in so doing, selling it and receiving the money. Now, I at that time was of opinion, and am so still, and I believe the court entirely concur with me, that that was not a proper view of the case to be left to the jury at all, but that the real question to be left to the jury would have been, whether or not the corn was in that state that, if brought home, it could have been sold for an amount exceeding the expense of bringing it home. If that was a point which could prop-

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erly have been made, and could have been properly decided in favor of the plaintiff, it would have been, in the opinion of myself and the court, a total loss; and that question, if it had been made at the trial, ought undoubtedly to have been left to the jury. I was anxious, therefore, the court should see whether or not that point had been made at the trial before me, and for that purpose we asked to be furnished with the shorthand writer's notes of the trial which took place before me at York, in order that my brothers Parke and Platt might have an opportunity of seeing and reading all that took place at the trial, in order that they (not myself) might determine whether that point really had been made at all. Undoubtedly, if it had been made and was not left to the jury, it ought to have been left; but I must say, that if the point had been made at the trial I should have determined it precisely in the same manner as the court now propose to determine it; namely, by saying that it would have been a clear total loss in case the corn, if brought to England, would not have been sold for the expense of bringing it from the port in Norway to Hull for the purpose of being sold. There is no doubt about that. It did so happen that, in the course of my summing up, that very point had occurred to my mind, and I suggested it to the jury, stating what my opinion upon that point was, but I certainly did not leave it to the jury, but studiously subtracted it from them; and therefore they did not pass any judgment upon it, and consequently there ought to have been a new trial if the point really had been made; but in truth it was not made at all, nor could it have been made consistently with the facts which were proved, for the expense of bringing the corn from Norway to Hull did not exceed 120*l.*, and the sale of the corn in Norway produced upwards of 500*l.* or 600*l.*; therefore, the real truth was, the point was not made, because the facts did not warrant the learned counsel who led the cause in making the point at all. My learned brothers have read the case over, and looked at the shorthand writer's notes of the trial, and they are of opinion that the point was really not made, and consequently, although, in delivering the judgment, we think it right to express what our opinion is upon the law upon the subject, there must be no new trial upon the ground that the point was not made at all; and that, therefore, it was not left to the jury; and the reason, in truth, why it was not made was, that the facts of the case did not warrant the learned counsel in making it.

Rule discharged.

Davison v. Farmer & Grace.

DAVISON v. FARMER & GRACE.¹

Hilary Vacation, February 14, 1851.

*Bankruptcy—Member of Banking Company under 7 Geo. 4, c. 46—
Liability of petitioning Creditor—Winding-up Acts—Isle of
Man not within United Kingdom.*

A member of a banking company, established under 7 Geo. 4, c. 46, cannot be proceeded against in bankruptcy for a debt due from the company, no judgment for such debt having been recovered against the public officer of the company, although the company may have ceased to carry on business, and an order have been obtained for winding it up under 11 & 12 Vict. c. 45, prior to such proceedings in bankruptcy. *Ex parte Wood*, 1 Mont. D. & D. 92; s. c. 9 Law J. Rep. (N. S.) Bankr. 20, overruled.

A fiat issued against the plaintiff, on the 20th of July, 1849, upon a debt due from a banking company, in which he was a member, to G., the petitioning creditor, without any judgment having been obtained against the public officer, and a warrant of seizure in the ordinary form was issued to F., the messenger, dated the 30th of July. The creditors' assignee was appointed August 21. The 12 & 13 Vict. c. 106, came into operation October 11, and on the 18th of October a seizure of the plaintiff's goods was made by the messenger F. under the said warrant:—

Held, that the fiat was invalid, and that either the petitioning creditor or the messenger was liable in trover for the wrongful seizure, but the court declined to determine which of the two was liable, as it was not required by the case submitted for their opinion.

The Isle of Man is not within the United Kingdom; and therefore a person residing there at the time of an adjudication of bankruptcy against him has three months within which he may contest the validity of the fiat or petition for adjudication, under 5 & 6 Vict. c. 122, s. 24, or 12 & 13 Vict. c. 106, s. 233.

TROVER for the conversion of certain goods and chattels alleged to be the property of the plaintiff.

Pleas—Not guilty and not possessed, and issues thereon.

The cause came on to be tried, at the Spring assizes, 1850, for the town and county of the town of Newcastle upon Tyne, before Alderson, B., when a verdict was entered for the plaintiff, with 1s. damages on both the issues, subject to the opinion of the court upon the following case:—

The plaintiff, for some time prior to the 2d of December, 1848, carried on the trade of a grocer in a shop situate in a street or place called Ouseburn, in the town of Newcastle upon Tyne, and he resided in a house to which the shop was attached then and for upwards of two years before that time. Prior to the contracting of the debt due to the defendant, Edward Grace, as hereinafter mentioned, the plaintiff became a member of, and a holder of, 112 shares in "The North of England Joint-stock Banking Company," the said company consisting of a number of more than six persons, and carrying on business under the provisions of 7 Geo. 4, c. 46, and pursuant to that act one George Burdis was duly appointed and registered as the public officer of the said banking company. The plaintiff continued to hold the shares up to March, 1848, when the banking company stopped payment. On the 17th of November an order for winding up the banking company was obtained pursuant to 11 & 12 Vict. c. 45,

¹ 20 Law J. Rep. (N. S.) Exch. 177.

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which order was duly advertised in the London Gazette, and on the 22d of November, John Henderson, John Hewson, and James Ross were appointed official managers, and by them a list of contributories was made out, and, after due notice, settled by the Master Farrer. The plaintiff was included in such list, as follows : —

Name.	Address.	For how many shares of 100 <i>l.</i> each.
Mr. George Davison.	Onseburn, Newcastle.	112

On the 30th of November, 1848, Master Farrer made a peremptory order, pursuant to the act, for a call of 30*l.* per share, and that each contributory should, on the 22d of December, 1848, at the banking house of the North of England Joint-stock Banking Company, Newcastle, pay to the official managers the balance (if any) which would be due from him after debiting his account in the company's books with such call.

The order having been made, was advertised in the London Gazette on the 12th of December, 1848, and a copy of it, together with a statement of the balance of the plaintiff's account with the said banking company, after debiting the same account with the amount chargeable against him in respect of such call, was, on the 6th of December, 1848, put into the post-office at Newcastle on Tyne, addressed to the said plaintiff at his then last known address. Such copy and statement, or either of them, never were returned. The statement last mentioned was in the words and figures following, viz. : —

“ North of England Banking Company,
Newcastle, Dec. 1, 1848.

“ Take notice that you are served with the above order of the master for a call ; and also that the balance of your account, after debiting you with the amount chargeable against you in respect of such call, is 275*4l.* 16*s.* 4*d.*, which sum you are to pay as in the order mentioned, or in case of default you will be liable to have process of execution issued against your property and person, upon affidavit of the official managers of such default, and without any previous demand by the official managers, or any other person.” Signed by the official managers.

The plaintiff left his house and place of business at Newcastle on Tyne, on the 2d of December, 1848, and kept out of the way, to avoid being served with any order for payment of any call which might be made upon him as a member or contributory in the said bank, by any order of the master in chancery under the said act of Parliament ; and he never afterwards returned to his house or shop, or carried on any trade or business, and on the 8th of December in the year aforesaid, he quitted Newcastle on Tyne, and went to the Isle of Man, where he has ever since been residing.

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The defendant Edward Grace was a creditor of the said banking company for the sum of 238*l.* 8*s.* 10*d.*, lent by him to the said banking company in the early part of the year 1847. To secure that debt, two several promissory notes, bearing date the 23d of April, 1847, drawn in the name of the said company by two of the directors thereof, one of such notes being for the sum of 123*l.* 8*s.* 10*d.*, payable to the said defendant Edward Grace, or order, three years after the date thereof, were given by the said banking company to the said Edward Grace, on the day of the date thereof.

The defendant Edward Grace was not a member of, nor a person holding shares in, the said banking company.

On the 21st of July, 1849, a fiat in bankruptcy issued against the said plaintiff, on the petition of the said defendant Edward Grace. No debt was, at the time of the presenting of the said petition, or when the said fiat issued, or at any time since, due or owing from the said plaintiff to the said defendant Edward Grace, nor had the said Edward Grace any claim or demand, other than and except such debt, claim, or demand (if any) as under the circumstances hereinbefore set forth, arose in respect of the said debt, owing from the said banking company to the said Edward Grace.

The fiat was prosecuted against the said plaintiff in the Newcastle upon Tyne District Court of Bankruptcy, and on the 30th of July, 1849, the plaintiff was, by Nathaniel Ellison, Esq., the commissioner of the said district court, declared and adjudged to be bankrupt, and on the same day one Thomas Baker was, by the said commissioner, nominated and appointed official assignee of the said plaintiff's estate and effects, and on the same 30th of July, the commissioner of the said district court granted his warrant under his hand and seal, directed to the said defendant James William Farmer, his messenger, and which said warrant was and is to the tenor and effect following:—

“Whereas, a fiat in bankruptcy, dated the 20th of July, 1849, hath been awarded and issued forth against George Davison, of the borough and county of Newcastle upon Tyne, banker, grocer, dealer, and chapman, directed unto her majesty's Newcastle upon Tyne District Court of Bankruptcy; and whereas, the said George Davison hath been duly found and declared bankrupt under the said fiat; these are, therefore, by virtue of the said fiat and the statutes in such case made and provided, to will and require, authorize and empower you and every one of you to whom this warrant is directed, forthwith to enter into and upon the house and houses of him the said George Davison, and also all other place and places belonging to him the said George Davison, where any of his goods are or are suspected to be,”—and the warrant then proceeded to direct the seizure of his goods, &c.

On the 7th of August, 1849, notice was given in the London Gazette that the said fiat had issued, and that the plaintiff had been declared and adjudged bankrupt by the said commissioner, and the said plaintiff was thereby summoned and required to be and appear personally before the commissioner on the 21st of August, then

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instant, at a certain time therein mentioned, and on the 14th of September, then next, at a certain time mentioned at the said District Court of Bankruptcy, then and there to be examined and to make a full and true discovery and disclosure of his estate and effects, according to the act of Parliament then in force. On the 21st of August, 1849, John Brooksbank Calvert, of the borough and county of Newcastle upon Tyne, auctioneer, was appointed the creditors' assignee of the estate and effects of the said plaintiff under the said fiat. On the 18th of October, the defendant James William Farmer, (the messenger of the said district court,) professing to act under the warrant hereinbefore set out, seized the goods and chattels in the declaration mentioned, the same then being in the house of one Edward Davison, and being the proper goods and chattels of the said plaintiff at the time when the fiat issued, and continuing to be his proper goods and chattels up to and at the time of the said seizure, unless his right thereto and property therein had become divested out of him by virtue of the fiat and proceedings hereinbefore set forth.

At the date of the adjudication, and at the time of the publication of the said advertisement in the Gazette, the plaintiff was in the Isle of Man, and had continued to be and reside there ever since. On the 26th of October, 1849, the plaintiff served a notice on the defendant Farmer, demanding perusal of a copy of the warrant under which he had made the seizure, and the defendant Farmer complied with such demand before the expiration of six days from being served with the said demand.

The present action was commenced by writ of summons issued out of this honorable court, on the 3d of November, 1849; but prior thereto the plaintiff had not commenced any action, suit, or other proceedings to dispute or annul the said fiat. The plaintiff, after the commencement of the action and before issue was joined in it, gave notice in writing to the said defendants that he intended to dispute the petitioning creditor's debt, the trading and the act of bankruptcy.

The questions for the opinion of the court were, first, whether under the circumstances hereinbefore set forth there was any sufficient petitioning creditor's debt to support the fiat; second, whether under the circumstances hereinbefore set forth the plaintiff had committed an act of bankruptcy at or before the time of the issuing of the said fiat; third, whether by reason of the actions not having been commenced until more than twenty-one days had elapsed after the advertisement of the bankruptcy in the London Gazette, the Gazette containing such advertisement is to be deemed conclusive evidence as against the plaintiff that he had become a bankrupt before the date and issuing forth of the said fiat; fourth, whether both or either of the defendants are liable in respect of the said seizure. If the court should be of opinion that, under the circumstances hereinbefore set forth, the plaintiff is entitled to retain the verdict against both or either of the defendants in respect of both or either of the issues joined between the parties, the verdict was to be entered against both or either of the defendants, and on both or either of the issues, as the

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court should direct. If the court should be of opinion that the plaintiff is not entitled to retain his verdict on either issues against either of the defendants, a nonsuit was to be entered.

Knowles, (with whom was *Unthank*.) for the plaintiff.¹ The first question is, whether the Isle of Man is within the United Kingdom. By the 5 & 6 Vict. c. 122, s. 24,² (and a similar provision is contained in the 12 & 13 Vict. c. 106, s. 233,) the advertisement of bankruptcy in the London Gazette is conclusive evidence of the validity of the fiat as against the bankrupt, if he has not within the period there specified commenced an action or other proceeding to dispute the fiat. The period is twenty-one days if he were within the United Kingdom at the date of the adjudication, but three months if he were in any other part of Europe. The advertisement in this case was on the 7th of August, and the action was commenced on the 3d of November, and therefore in time, if the Isle of Man be not in the United Kingdom. This term is first used in the 39 & 40 Geo. 3, c. 67, by which Great Britain and Ireland are declared to be united by the name of "The United Kingdom of Great Britain and Ireland." But the Isle of Man is not part of Ireland, nor of Great Britain. That title was used upon the union of England and Scotland, 5 Anne, c. 8. At that time the Isle of Man was a distinct territory, and not affected by acts of Parliament, unless named therein. 4 Inst. 284. It became vested in the crown by the 5 Geo. 3, c. 26; but in numerous statutes it is spoken of as distinct from the United Kingdom, as in the Trade Acts, 6 Geo. 4, c. 115, s. 14, 3 & 4 Will. 4, c. 60, s. 14, 15; the Customs Acts, 8 & 9 Vict. c. 85 to 94, inclusive; the Post-office Act, 11 & 12 Vict. c. 117, s. 1.

The second question is, whether there was a sufficient petitioning creditor's debt. The learned commissioner, Mr. Ellison, acted on the authority of *Ex parte Wood*, 1 Mont. D. & D. 92; s. c. 9 Law J. Rep. (N. s.) Bankr. 20; but the nature of these banking companies is now more fully understood, and *Steward v. Greaves*, 10 Mee. & W. 711; s. c. 12 Law J. Rep. (N. s.) Exch. 109, is conclusive that all legal

¹ January 27, before PARKE, ALDERSON, and PLATT, BB. POLLOCK, C. B., was present during the latter part of the argument only.

² That section enacts, "That if the bankrupt shall not, (if he were within the United Kingdom at the date of the adjudication,) within twenty-one days after the advertisement of the bankruptcy in the London Gazette, or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat, and shall not have prosecuted the same with due diligence and with effect, the Gazette containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, and that such fiat was sued forth, or such petition filed, on the day on which the same is stated in the Gazette to bear date."

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proceedings must, in the first instance, be taken against the public officer.¹ Such banking companies owed their existence to the statute, and the rights of creditors can only be enforced according to the statute. If it were not so, individuals would be made liable for debts by reason of their partnership at the time the debt accrued, whereas by the act members at the period of the execution are liable in the first place. A petitioning creditor's debt must be a debt recoverable at law by action against the bankrupt; but no action could have been brought against any one but the public officer, and it must be taken that the public officer once appointed continues. *Steward v. Dunn*, 12 Mee. & W. 655; s. c. 13 Law J. Rep. (N. S.) Exch. 324. The individual membership is merged in the *quasi* corporate character of the body, so that notice to one partner is not notice to the company. *Powles v. Page*, 3 Com. B. Rep. 16; s. c. 15 Law J. Rep. (N. S.) C. P. 217. If this fiat could issue, then proceedings in bankruptcy might also have been taken against every member. But, even assuming that the debt was a good petitioning creditor's debt, there was no act of bankruptcy. The case finds that the plaintiff went away from his home on the 2d of December, and he could not be guilty of departing from the realm to delay his creditors, unless the call made on the 30th of November was a debt, for the debt to Mr. Grace was not then due, for the purposes of making the departure an act of bankruptcy, although under the 5 & 6 Vict. c. 122, s. 19, it may be a good petitioning creditor's debt. A call under the 11 & 12 Vict. c. 45, s. 87, is not valid until advertised, and this was not done until the 12th of December, so that not until then could it be considered a debt. Even if a debt on the 30th of November, it was not recoverable at law. It would be due to the official managers as trustees for all the shareholders, but they do not appear to be empowered to sue for such call. After the 2d of December the plaintiff ceased to be a trader, and he could not be made bankrupt in respect of any debts which accrued afterwards. As to the last question, assuming the fiat to have been illegally issued, one or other of the defendants must be liable. The 6 Geo. 4, c. 16, is not entirely repealed, but kept alive for the purposes of pending proceedings.² A warrant already issued may be included

¹ The court then called upon Hugh Hill, but the arguments used by Knowles in reply are for convenience inserted here.

² The 12 & 13 Vict. c. 106, s. 1, enacts, "That from and after the commencement of this act the several acts and parts of acts set forth in the schedule A to this act annexed, to the extent to which such acts or parts of acts are by such schedule expressed to be repealed, and every other act or acts, and such parts of every other act or acts, as shall be inconsistent with this act, shall be repealed, except so far as the said acts or parts of acts, or any of them, repeal any former act or part of an act, and except also so far as may be necessary for the purpose of supporting any proceedings taken or to be taken under and after the commencement of this act upon any trading, act of bankruptcy, petitioning creditor's debt, fiat, or other proceeding in bankruptcy before the commencement of this act, and except as to the recovery and application of any penalty for any offence which shall have been committed before the commencement of this act."

Sect. 4 enacts, "That this act, unless where otherwise specially provided, shall commence and take effect from and after the 11th of October next; and that from and after the commencement of this act no fiat in bankruptcy shall be issued, but all pro-

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in the words "other proceedings" in the 1st section of the Bankrupt Consolidation Act, in which case the 6 Geo. 4, c. 16, s. 31, 32, would apply, and if under those sections the messenger would be exonerated, the petitioning creditor would be responsible. But as the seizure here was after the choice of assignees, the messenger is not protected by the 31st section. If, on the other hand, the Bankrupt Consolidation Act applies, then under sects. 107, 108, the petitioning creditor will be liable, and not the messenger, and under these sections a petitioning creditor's liability seems to be much extended, as the words "prior to the choice of assignees" are omitted.

Hugh Hill, contra. The first point will depend upon the meaning

ceedings in bankruptcy, or to found an act of bankruptcy, shall, and proceedings for arrangement between debtors being traders liable to become bankrupt and creditors may be by virtue of and according to the provisions of this act; and that all proceedings in bankruptcy, and every fiat in bankruptcy, and petition for such arrangement, depending at the commencement of this act, shall be proceeded in and brought to a conclusion under the provisions of this act: Provided that every trading, act of bankruptcy, petitioning creditor's debt, or other matter or thing, which before the commencement of this act would have authorized proceedings in bankruptcy, shall after the commencement of this act be sufficient to authorize proceedings in bankruptcy under this act, and nothing in this act contained shall render invalid any proceedings in bankruptcy, or any fiat in bankruptcy, or any petition for arrangement, depending at the commencement of this act, or any proceedings which may have been instituted or taken under or by virtue of such bankruptcy, fiat, or petition, or lessen or affect any right, title, claim, demand, or remedy which any person now has or hereafter may have under or by virtue thereof, or lessen or affect any right, title, claim, demand, or remedy which any person now has or hereafter may have upon or against any bankrupt, against whom any fiat has or shall have been issued, or against any such trader who may or shall have presented such petition, except as in this act is hereafter specially provided."

The 6 Geo. 4, c. 16, s. 31, enacted, "That no action shall be brought against any person so appointed by the commissioners, for any thing done in obedience to their warrant *prior to the choice of assignees*, unless demand of the perusal and copy of such warrant hath been made or left at the usual place of abode of such person or persons by the party or parties intending to bring such action, or by his or their attorney or agent, in writing, signed by the party or parties demanding the same, and unless the same hath been refused or neglected for six days after such demand; and if after such demand and compliance therewith, any action be brought against the person so appointed as aforesaid, without making the petitioning creditor or creditors, defendant or defendants, if living, on producing and proving such warrant at the trial of such action, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in the commissioners; and if such action be brought against the petitioning creditor or creditors and the person so appointed as aforesaid, the jury shall, on proof of such warrant, give their verdict for the person so appointed as aforesaid, notwithstanding any such defect of jurisdiction as aforesaid; and if the verdict shall be given against the petitioning creditor or creditors, the plaintiff or plaintiffs shall recover his or their costs against him or them, to be taxed so as to include such costs as the plaintiff or plaintiffs are liable to pay to the person so appointed as aforesaid."

Sect. 32 enacts, "That in any such action so brought as aforesaid against the petitioning creditor or creditors, either alone or jointly with the person so appointed by the commissioners as aforesaid, for any thing done in obedience to their warrant, proof by the plaintiff or plaintiffs in any such action that the defendant or defendants, or any of them, are petitioning creditors, shall be sufficient for the purpose of making such defendant or defendants liable, in the same manner, and to the same extent, as if the act complained of in such action had been done or committed by such defendant or defendants."

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of the word "within." If it mean within the ambit, the Isle of Man will be included. It could never have been intended that a trader who was at the farthest end of Ireland should have only twenty-one days to dispute the adjudication, and one who was in the Isle of Man three months. It must be admitted that the Isle of Man is not ordinarily included in the words "United Kingdom."

[Parke, B. I do not see my way out of the express words.]

The second point is more important, and it is submitted that the decision of *Steward v. Greaves* does not establish that no proceedings in bankruptcy can be taken against the members. The 7 Geo. 4, c. 46, s. 9, does not mention proceedings in bankruptcy at all, but only refers to actions at law or suits in equity. The omission, where the legislature was expressly providing for the remedies against a company through their public officer, is important, and the creditor is not to be deprived by implication of his right to proceed under the bankruptcy statutes against any partner. It is not necessary to decide in this case the precise extent of the liability of the partners, for the bankrupt was a member both at the time of the fiat and the accrual of the debt. In *Steward v. Greaves*, the court did not decide that in no case could a remedy be had against a member in the first instance; for the concluding passage of the judgment is, "that the common law remedy is taken away, at least where such officer exists and is in England." In this instance, the banking company had ceased to carry on business, and the appointment of the official managers would put an end to all the powers and duties of the public officer. [He referred also to *Barker v. Bulltress*, 7 Beav. 134; s. c. 13 Law J. Rep. (N. S.) Chanc. 58.] It is submitted that the decision in *Ex parte Wood* was correct, and ought to be followed.

[Platt, B. Is there any case, excepting of course those specified in the statute, in which a debt is sufficient to support a fiat, unless an action is maintainable for it?]

In *Jellis v. Mountford*, 4 B. & Ald. 256, it was held that a debt barred by the debtor's discharge, under 53 Geo. 3, c. 102, would support a fiat in bankruptcy.

[Parke, B. There the debt had been once recoverable at law: here at no time could an action have been brought against the plaintiff by Mr. Grace.]

Assuming that the fiat was invalid, neither of the defendants is liable. The seizure was after the choice of assignees, and the petitioning creditor cannot be held to be liable, not having interfered in any way to direct the seizure. The 108th section of the Consolidation Act cannot mean that the petitioning creditor is to be liable as such for every thing done by the messenger. Nor is the messenger liable, for he is a mere ministerial officer, and bound to obey the commissioner's warrant. The Court of Bankruptcy is a court of record, and having general jurisdiction over the subject matter, the officer is excused, although the commissioner may have given a wrong decision. *Ackerley v. Parkinson*, 3 M. & S. 411; *Thomas v. Hudson*, 14 Mee. & W. 353; s. c. 14 Law J. Rep. (N. S.) Exch. 283; affirmed in error, 16 Mee. & W. 885; s. c. 17 Law J. Rep. (N. S.) Exch. 365,

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and *Calder v. Halkett*, 3 Moo. P. C. 28. There was no demand of possession subsequent to the seizure.

Knowles, in reply. Unless one of the defendants is held liable, the plaintiff would have no remedy for the illegal seizure. The petitioning creditor had no justification for commencing the proceedings.

Judgment was now delivered by

Cur. adv. vult.

PARKE, B. There are three questions for the decision of the court in this case, the fourth being, in the view we take, immaterial. First, whether the petitioning creditor's debt was sufficient. Secondly, whether, if sufficient, the plaintiff could now dispute his bankruptcy. Thirdly, whether either of the defendants was liable in this action.

The petitioning creditor's debt was sufficient in amount, but was claimed to be due from the plaintiff as a shareholder in a joint-stock banking company, acting under the 7 Geo. 4, c. 46. A debt, in order to support a petition for a fiat, must be due at law on demand, and must be one which could be enforced at some time by action. It was contended that this debt was not a legal debt from the plaintiff to the petitioner, nor could an action be supported by him against the plaintiff at any time in respect of it. The case of *Steward v. Greaves* decided that no action would lie by a creditor against an individual member for the debt of the company whilst he was a public officer; and, consequently, that the petitioning creditor's debt in this case was not sufficient, unless the want of a public officer at the time of petitioning made a difference. This decision proceeded on the construction of the act of Parliament, 7 Geo. 4, c. 46, s. 9, which showed very clearly the intention of the legislature, that no action should be brought except against the public officer, and created an entirely different species of liability from that of ordinary partners. But it was contended, on behalf of the defendant, first, that the statute did not mean to prevent commissioners of bankruptcy proceeding against individual members, though it did mean to put a stop to actions; and, secondly, that the company could be sued only when there was a public officer; and when there was no longer one, as was the case when there was an official manager appointed, individual members became liable.

We do not think that either of these arguments ought to prevail. We cannot suppose that the legislature ever meant the individuals composing the company to have commissions of bankruptcy taken out against them in respect of the debt due from the company when it did not allow actions to be brought. There is nothing like an express provision to that effect in the acts, nor can we discover any ground to imply one. The object seems to have been to make the bankers acting under the act corporations, with a qualified liability in the shareholders to the debts of the company. We also think the second point untenable, namely, that as soon as there ceased to be a public officer the common law liability of each member revived. The opinion of the court was strongly intimated that there was no such

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liability in that event, in the case of *Steward v. Greaves*, and we think that opinion was correct. Every contract entered into by such a company is of a different character from that of an ordinary partnership, in which individuals are bound, as was clearly pointed out in that case; and it would be a strange thing if the nature of the engagements was to be altogether changed, that persons should cease to be liable who were so before, and others become liable who were not, and to be charged in a different way by the company ceasing to appoint a public officer.

The next question was disposed of during the argument.

It was contended that the plaintiff was prohibited from disputing the validity of his fiat, by the 5 & 6 Vict. c. 122, s. 24, because he was within the United Kingdom, and did not within twenty-one days after the advertisement of his bankruptcy in the Gazette commence an action to dispute or annul the fiat. We have already said that being in the Isle of Man, he was not within the United Kingdom. This is no doubt an oversight in the legislature, but we cannot supply the defect. The only remaining point is, whether the two defendants, the petitioning creditor or the messenger, are liable. It is conceded by their learned counsel, that if either be liable, it is, in consequence of the arrangements between them, immaterial to decide which of the two is. We should have had some difficulty in deciding that, point, but we are all satisfied that neither the one or the other is responsible. The question depends upon the construction of the Bankruptcy Consolidation Act. The first section repeals, among other acts, the 6 Geo. 4, c. 16, except so far as may be necessary for the purpose of supporting any proceedings taken or to be taken under or after the commencement of that act, upon any trading, act of bankruptcy, petitioning creditor's debt, fiat, or other proceeding in bankruptcy before the commencement of the act, viz., the 21st of October, 1849.

The fiat in this case was dated the 20th of July, 1849—the warrant of seizure issued the 30th of July. The creditors' assignee was appointed on the 21st of August, and the seizure of the goods, the conversion complained of, took place on the 18th of October, 1849. If this seizure is to be considered as a proceeding under the 6 Geo. 4, c. 16, and therefore that act still continued unrepealed for the purpose of supporting it, then the messenger was responsible, for under that statute he was not protected by the warrant, (sect. 31;) for the statute gave protection only for acts done before the choice of assignees, and that act was done afterwards, and the petitioning creditor was not liable. If, on the other hand, his seizure must be considered as governed by the provisions of the new act, the petitioning creditor would be liable, and the messenger protected. The plaintiff, therefore, is entitled to recover.

In deciding that the petitioning creditor's debt was insufficient in this case, we overrule a case in the Court of Bankruptcy—*Ex parte Wood*. But that decision took place before the nature of the liability of joint-stock companies had been fully settled, as it was in the case

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of *Steward v. Greaves*; and holding the law to be correctly laid down in that case, we think the case in bankruptcy, upon which the learned commissioner (Mr. Ellison) acted, cannot be sustained.

Judgment for the plaintiff.

SHARROD v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.¹

Michaelmas Term, December 10, 1849.

Railway Company, Liability of — Damage done by Train — Form of Action — Trespass or Case.

A railway train driven at the rate of forty miles an hour, according to the general directions of the railway company to the driver, ran over and killed some sheep which had strayed on the line in consequence of the defective fences of the company:—

Held, that the train being under the direction and control of a rational agent, the company were not liable in *trespass* for the injury; but that the proper form of action was by action on the *case*, either for permitting the fences to be out of repair, or for directing the servant to drive at such a rate as to interfere with the right of the sheep to be on the line of railway.

TRESPASS for driving a railway engine and carriages with great force against certain sheep of the plaintiff, by reason whereof they were killed.

Plea — Not guilty.

At the trial, before Rolfe, B., at the Stafford Summer assizes, 1848, it appeared that seven sheep of the plaintiff had strayed upon the railway of the defendants, from land of the plaintiff which adjoined the railway, in consequence, as was alleged, of the insufficiency of the fences belonging to the defendants, and were killed by an express train driven along the line at the speed of forty miles an hour. The driver of the engine had general directions from the defendants to drive the train at this speed, and it appeared that if he had seen the sheep he could not have stopped the train in time to prevent the collision. It was objected for the defendants, that the action, if maintainable at all, should have been in *case*, and not in *trespass*; and a verdict having been found for the plaintiff, with 10*l.* damages, leave was reserved to the defendants to move to enter a nonsuit on this objection.

A rule to show cause having been obtained accordingly, —

Talfourd, Serj., and *Whitmore* showed cause, in Hilary vacation, 1849. The difficulty here lies in applying established principles of law to a new state of facts. The injury in this case is immediate: the engine of the defendants was impelled against the sheep of the plaintiff; so far, therefore, there can be no doubt, *trespass* is the proper remedy. The question then is, whether the act complained of is not

¹ 20 Law J. Rep. (N. S.) Exch. 185.

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constructively that of the company. The sheep were lawfully on the line of railway.

[*Alderson, B.* Yes ; on these pleadings the sheep must be taken to have been on the line of railway with the knowledge and permission of the defendants.]

Then the driver of the engine, the servant of the company, was obeying the general directions of the defendants ; he was doing what he was told by them to do, driving at a prescribed speed at a particular place and at a particular time. What he did precisely in execution of his employers' orders necessarily led to the injury. But it is said, on the other side, that where an injury is done by a servant, acting in the general scope of his employment, the master is liable only in case.

[*Parke, B.* Is there any instance of an action of trespass against a master for the act of his servant, the master not being present, unless he directs and takes part in the particular act complained of ?]

Alderson, B. If a man had been killed instead of a sheep, could the company have been found guilty of manslaughter ?]

Yes, if they had directed the driver not to stop for any thing.

[*Alderson, B.* Surely not, if there was no person on the line at the time the order was first given.]

If the defendants put in motion a train of carriages at such a speed that it cannot be stopped in time to prevent an injury, the person who sets it in motion, i. e., the company, is answerable for the consequences in trespass, the injury being the immediate result of their act. If the servant exceeds his authority, then he, and not the company, would be answerable in trespass. *M'Manus v. Crickett*, 1 East, 106. But here there was no negligence or default in the driver ; he was simply executing the orders of the defendants, viz., "drive along the line at such a time and at such a speed, that if there be any thing in the way you must destroy it." The true principle is laid down in *Gregory v. Piper*, 9 B. & C. 591 : "A master is liable in trespass for any act done by his servant in the course of executing his orders with ordinary care ;" and that principle applies to the present facts, for the injury inevitably and directly resulted from the execution without negligence of the instructions of the defendants.

[*Alderson, B.* How is the case distinguishable from the ordinary one of an injury caused by a stage coachman ?]

A coachman may turn out of the road and avoid a collision ; he has the control of his horses and of their speed : the engine driver has not.

[*Alderson, B.* Surely that is a question of degree ; an engine driver is an intelligent agent as well as a coachman. As to the rate of speed directed, mail coaches were formerly compelled to go at a certain speed, but no one ever thought that the post-office was liable for an injury caused by their travelling at that speed. Can you treat an intelligent agent as an unintelligent thing ?]

You may under the peculiar circumstances of the case. If the accident could have been avoided by reasonable care, the servant is liable, not the master, for it is the servant's act ; but if, as in the

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present case, the injury occasioned by the act directed by the master could not be avoided by reasonable care on the part of the servant, it is the natural and necessary consequence of the master's act, and for that the master is liable in trespass.

Godson and Huddleston, contra. This is exactly like the ordinary case of an injury done by the driver of a mail coach. There is the governing power of man here; the engine driver puts on the steam and lets it off at pleasure, uses more power in ascending gradients, and puts on the brake in descending, just as a coachman uses his whip and reins. The rule is properly laid down in *Bac. Abr. "Trespass," A*: "The difficulty which has arisen in applying this distinction as to trespass and case has been chiefly in actions for injuries done in driving carriages and navigating vessels. If the carriage or vessel is to be considered as a mere passive instrument not less subservient to the person directing it than a gun or a stick held in his hand, it would follow that all immediate injuries received from its contact while under an individual's direction, whether arising from accident, negligence, or wilfulness, are as much trespasses committed by him as a wound from his gun or a blow from his stick; and it is in this light that such injuries appear to have been regarded by Lord Ellenborough and the Court of Queen's Bench in several cases. On the other hand, some other decisions seem to ascribe something of independent agency to a vessel under sail and a carriage drawn by horses; and it has been held, that an injury received from their contact, if accidental, and not wilful, does not amount to an immediate trespass, but only to a case of consequential damage." The question, therefore, here is, Was there not an independent agency? It may be conceded that if the damage had been occasioned by the defendants' directing a carriage to be run down an inclined plane on which it could not have been stopped, they would have been liable in trespass. But here, as there was a driver to control it, they are only liable in case.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

PARKE, B. We are of opinion, in this case, that an action of trespass will not lie against the company, the defendants. The immediate act which caused the damage to the plaintiff's cattle was the impact of a machine, which was under the control of a rational agent, the servant of the defendants; not so much so indeed as a horse, or carriage drawn by horses, or propelled by mechanical power along an ordinary highway would be, in which cases both the direction and the speed of the machine are under government, but still in such a degree as to make the cases similar for the purpose of deciding the present question. We may treat the case, then, as if the damage had been done by an ordinary carriage drawn by horses; and, it being

¹ PARKE, ALDERSON, ROLFE, and PLATT, BB.

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now settled that an action of trespass will lie against a corporation,¹ we may consider, for the present purpose, the defendants as one natural person, and the carriage under the care of his servants. Now, the law is well established on the one hand that, whenever the injury done to the plaintiff results from the immediate force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass; on the other, that if the act be that of the servant, and be negligent, not wilful, case is the only remedy against the master. The maxim "*qui facit per alium facit per se*" renders the master liable for all the negligent acts of the servant in the course of his employment; but that liability does not make the *direct* act of the servant the *direct* act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant, but not trespass, unless, as was said by the court in *Morley v. Gaisford*, 2 H. Black. 442, the act was done "*by his command*;" that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it, or some act which leads by a physical necessity to the act complained of. The former is the case when one, as servant, is ordered to enter a close to try a right or otherwise; the latter, when such a case occurs as *Gregory v. Piper*, where the rubbish ordered to be removed from a natural necessity fell on the plaintiff's soil; but, when the act is that of the servant in performing his duty to his master, the rule of law we consider to be, that case is the only remedy against the master, and then only is maintainable when the act is negligent or improper, and this rule applies to all cases where the carriage or cattle of a master is placed in the care and under the management of a servant, a rational agent. The agent's direct act or trespass is not the direct act of the master. Each blow of the whip, whether skilful and careful or not, is not the blow of the master, it is the voluntary act of the servant; nor can it, we think, be reasonably said that all the acts done in the skilful and careful conduct of the carriage are those of the master, for which he is responsible in an action of trespass, to the same extent as if he had given them himself, because he has impliedly ordered them; but those that were careless and unskilful were not, for he has given no order, except to use skill and care.

Our opinion is, that in all cases where a master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible in an action on the case for want of skill or care of the agent—no more; consequently, this action cannot be supported. We should observe that, though the master in this case is taken to have ordered the driver of the engine to proceed at a great speed, it did not follow as a *necessary* consequence that it would impinge on the plaintiff's cattle. It might not have happened if the driver had seen the cattle sooner, or the cattle had heard the engine and got out of the way. The act, therefore, cannot be treated as a trespass, on the ground that it was by neces-

¹ See *The Eastern Counties Railway Company v. Broom*, 1 English Reports, 406, (1851,) and note (1) by the editors.

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sary implication ordered to be done by the defendants — the principle on which the case of *Gregory v. Piper* was decided. This is the simple case of an act done by the servant in the course of his employment, not specifically ordered by the master, and though the injury by such an act be *direct* so far as relates to the servant, we have recently held, that a master would not be responsible in trespass. *Gordon v. Rolt*, 4 Exch. Rep. 365; s. c. 18 Law J. Rep. (N. S.) Exch. 432. If, in the present case, the plaintiff's cattle had a right to be on the railway, the plaintiff has a remedy by an action on the case against the company for causing the engine to be driven in such a way as to injure that right; for the defendants were bound to see that their carriages did not travel at such a speed as to make it impossible to avoid other persons who had a lawful right to be there. If the cattle were altogether wrong-doers, there has been no neglect or misconduct for which the defendants are responsible. If the cattle had an excuse for being there, as if they had escaped through defect of fences which the company should have kept up, the cattle were not wrong-doers, though they had no right to be there, and their damage is a consequent damage from the wrong of the defendants in letting their fences be incomplete or out of repair, and may be recovered accordingly in an action on the case.

*Rule absolute.*¹

THE ATTORNEY GENERAL v. ROBSON.²

Michaelmas Term, November 8, 1850.

Revenue — Customs Acts, 8 & 9 Vict. c. 87, s. 46 — Concerned in Unshipping.

The owner of a vessel, who knowingly lets his vessel that it may be employed in a smuggling adventure, and the cargo of which is unshipped without the duties being paid, is liable to the penalties, under the 8 & 9 Vict. c. 87, s. 46, as a person "concerned" in the illegal unshipping of the goods.

THIS was an information, under the 8 & 9 Vict. c. 87, s. 46,³ against the defendant as having been concerned in the illegal unshipping of tobacco at Yarmouth.

¹ It was also held in *Philadelphia, &c. R. R. Co. v. Will*, 4 Wharton, 143, (1839,) that trespass would not lie against a railroad corporation for an injury to the plaintiff by the defendant's locomotive, whether such injury was wilful or accidental on the

part of the servants of the company, unless it appear that the injury was done by the command or with the assent of the corporation; but that the proper remedy for such injury was an action on the case.

² 20 Law J. Rep. (N. S.) Exch. 188.

³ That section enacts, "That every person who shall, either in the United Kingdom or the Isle of Man, unship or assist or be otherwise concerned in the unshipping of any goods which are prohibited to be imported into the United Kingdom or into the Isle of Man, or the duties for which have not been paid or secured, or who shall knowingly harbor, keep, or conceal, or shall knowingly permit or suffer to be harbored, kept,

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At the trial, before Pollock, C. B., at the sittings in Middlesex, after Trinity term, 1850, it appeared that the defendant was owner of a vessel which he had let for a voyage from Newcastle to Schelling, well knowing that the object of the voyage was to obtain tobacco, and run it at Yarmouth. In order to carry out the plan, the defendant had cleared the vessel at Newcastle as for a voyage to Yarmouth, but the captain sailed direct to Schelling, under the guidance of a pilot put on board by the charterers. The defendant was at Yarmouth when the vessel arrived there, and after the cargo had been run complimented the captain on his skill. The defendant received 200*l.* for the use of the vessel. Upon this evidence, it was contended, on behalf of the defendant, that he was not guilty of the offence charged; but his lordship overruled the objection, and a verdict was found for the crown, with 8000*l.* penalties.

Bramwell now moved for a rule for a new trial for misdirection. The defendant was not assistant or concerned in the unshipping of the tobacco, although the purpose for which his vessel had been hired was known to him. He was not present at the time, and took no part in the running of the tobacco.

[*Pollock*, C. B. Supposing an indictment for conspiracy, could it not have been said that he was an associate in the transaction?

Platt, B. You say he was concerned in shipping, but not in unshipping the cargo.

Alderson, B. Although he may not be strictly an assistant, he was a person "otherwise concerned in the unshipping."]

Per curiam. The direction was right.

Rule refused.

or concealed, any goods which shall have been illegally unshipped without payment of duties, or which shall have been illegally removed without payment of the same, from any warehouse or place of security in which they may have been deposited, or any goods prohibited to be imported, or to be used or consumed in the United Kingdom or in the Isle of Man, and every person, either in the United Kingdom or in the Isle of Man, to whose hands and possession any such prohibited or uncustomed goods shall knowingly come, or who shall assist or be in any wise concerned in the illegal removal of any goods from any warehouse or place of security in which they shall have been deposited as aforesaid, shall forfeit either the treble value thereof, or the penalty of 100*l.*, at the election of the commissioners of her majesty's customs."

 Tharratt v. Trevor.

THARRATT v. TREVOR.¹

Hilary Term, January 31, 1851.

Costs, Certificate for, under 9 & 10 Vict. c. 95, s. 129 — Time for — Taxation of Costs.

Under the 9 & 10 Vict. c. 95, s. 129, (the County Court Act,) a judge of a superior court may certify for costs at any time before the costs are taxed.

THIS was a rule calling upon the defendant to show cause why so much of a rule obtained by him for a suggestion to deprive the plaintiff of costs, as related to a stay of proceedings, should not be set aside. It appeared that the action had been brought against the defendant to recover damages on account of his having put an end to a contract without a quarter's notice, and having been tried, before Platt, B., on the 14th of January, the plaintiff obtained a verdict, damages 10*l*. The judge at the trial abstained from certifying under the 9 & 10 Vict. c. 95, s. 129, that the cause was fit to be tried before the superior court, but referred the parties to chambers. On the 21st of January, the defendant served the plaintiff with the rule for a suggestion to deprive the plaintiff of costs, and for a stay of proceedings. The plaintiff thereupon obtained the present rule, subsequently to which, namely, on the 30th of January, Platt, B., granted a certificate at chambers, entitling the plaintiff to costs.

Knowles, for the defendant, showed cause. The learned judge had no power fourteen days after the trial to grant a certificate giving the plaintiff his costs. The certificate ought to have been granted either at the trial, or at least before the time had elapsed for moving for a new trial. The 129th section of the County Courts Act, 9 & 10 Vict. c. 95, deprives the plaintiff of costs in certain cases, unless the "judge who shall try the cause shall certify on the back of the record, that the action was fit to be brought in such superior court." The judge ought to grant the certificate within a reasonable time; that is, whilst the record is in his power.

[*Parke*, B. The language of the 22 & 23 Car. 2, c. 9, relating to costs, is nearly the same as that of the act just cited, and in that case the certificate need not be granted at the trial, but must be made within a reasonable time.]

That reasonable time is limited to the four days within which a new trial may be moved for. At all events, the present rule must be discharged on the ground that the defendant's rule was properly drawn up with a stay of proceedings.

Burchell, in support of the rule. First, the judge who tried the cause was not bound to certify at the time of trial. Secondly, the plaintiff is entitled to set aside so much of the defendant's rule as relates to a stay of proceedings.

¹ 20 Law J. Rep. (N. S.) Exch. 189.

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PARKE, B. It is quite clear, unless the statute limits the period, that a certificate may be given at any time before costs are taxed. The rule, however, must be discharged, on the ground that part of the rule for a suggestion relating to a stay of proceedings, which is sought to be set aside, is regular and usual.

POLLOCK, C. B., ALDERSON and MARTIN, BB., concurred.

Rule discharged.

MEAD v. BASHFORD.¹

Hilary Vacation, February 26, 1851.

Pleading — Set-off — Statute of Limitations.

Debt. Plea, set-off alleging that the amount due from the plaintiff to the defendant equalled the plaintiff's claim. Replication, as to the plea, so far as it related to 49l. 16s. 10d., parcel, &c., the Statute of Limitations, concluding with a verification, and as to the residue that the plaintiff was not nor is indebted *modo et forma* : —

Held, on special demurrer, that the replication was bad.

The proper replication in such case would be, that part of the set-off was barred by the Statute of Limitations, and that the plaintiff was not indebted to the defendant in any sum which (with the part so barred) equalled the amount of his demand.

DEBT for goods sold and delivered and upon an account stated.

Plea—A set-off, alleging in the usual form that the amount due from the plaintiff to the defendant equals the debt demanded and all damage by the plaintiff sustained by reason of the detention thereof.

Replication, as to the plea, so far as it relates to 49l. 16s. 10d., parcel of the debt in the declaration demanded, that the supposed debts and causes of set-off in the plea mentioned, so far as the same relate to the said sum of 49l. 16s. 10d., did not, nor did any or either of them, accrue to the defendant at any time within six years next before the commencement of this suit *modo et forma*. Verification.

And as to the plea so far as it relates to the residue of the causes of action in the declaration mentioned, that "the plaintiff was not nor is indebted" *modo et forma*, — concluding to the country.

Special demurrer and joinder.

Peacock, in support of the demurrer, (May 27, 1850.) The replication is bad, because it neither traverses nor confesses and avoids the plea. It is like the replication in *Briscoe v. Hill*, 10 Mee. & W. 735; s. c. 12 Law J. Rep. (n. s.) Exch. 126, where the plaintiff replied, except as to part of the set-off, he was not indebted at the commencement of the suit and at the time of the plea pleaded; and as to that part, payment thereof into court in a cross action brought by the defendant against him, averring that the defendant had taken it

¹ 20 Law J. Rep. (n. s.) Exch. 190.

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out in satisfaction. This was held a bad replication, and Parke, B., in his judgment said, "On the record, as it now stands, there is no averment on the part of the defendant that the moneys in the plea, exclusive of the sum alleged to have been received in the cross action, are sufficient to meet the plaintiff's demand. The plaintiff has replied as if that fact were alleged in the plea, and, therefore, the replication is bad, inasmuch as there is no affirmative allegation on the one side met by an express negative on the other." The replication as suggested by Parke, B., in *Fairthorne v. Donald*, 13 Ibid. 424; s. c. 14 Law J. Rep. (N. S.) Exch. 205, should be, as to part, that it was barred by the Statute of Limitations, and that the plaintiff was not indebted to the defendant in any such sum as with that sum equalled or exceeded the amount claimed in the declaration. In that case, to a set-off alleged to exceed the damages in the declaration, the plaintiff replied, as to the causes of set-off, so far as related to 234*l*. 5*s*. 3*d*., parcel, &c., the Statute of Limitations, and that he, the plaintiff, was not nor is indebted to the defendant in the residue, *modo et forma*, with a prayer of judgment; and the court intimated that the replication was bad. So in *Turnbull v. Pell*, 2 Exch. Rep. 793; s. c. 18 Law J. Rep. (N. S.) Exch. 45, the defendant having pleaded, by way of set-off, that the plaintiff was indebted to him in 149*l*. 14*s*. 6*d*. upon a judgment, and in 43*l*. 12*s*. on a promissory note, and in 500*l*. for work and labor, &c., the plaintiff replied, that he was not nor is indebted, because as to 149*l*. 14*s*. 6*d*. there was no record of the said judgment, concluding with a verification, and that as to the residue other than the said sum of 149*l*. 14*s*. 6*d*., the plaintiff was not indebted to the defendant, concluding to the country, and this replication was amended at the suggestion of the court. There is no complete affirmative and negative on these pleadings. *Blakesley v. Smallwood*, 8 Q. B. Rep. 538; s. c. 16 Law J. Rep. (N. S.) Q. B. 185. He referred also to 1 Wms. Saund. 338, n.

Lush, contra. At present it is impossible to say what the right form of replication is, where there are different answers to different parts of the set-off. A set-off is substantially a counter action, and the defendant is not entitled to the verdict on the plea unless the whole cause of action is covered by it and the other pleas. *Tuck v. Tuck*, 5 Mee. & W. 109; s. c. 8 Law J. Rep. (N. S.) Exch. 165. *Rodgers v. Maw*, 15 Ibid. 444; s. c. 16 Law J. Rep. (N. S.) Exch. 137. Suppose a set-off was founded upon two bills of exchange, each equal to the plaintiff's demand, and one was barred by the statute and the other paid: if the Statute of Limitations were alone replied, the plaintiff would be entitled to the verdict.

[*Alderson*, B. Who would have to pay the costs if the Statute of Limitations were replied to part and never indebted to the residue, and the plaintiff succeeded on one and the defendant as to the other?]]

Each party would recover the costs as to that upon which he succeeded. The defendant should new assign, if he means to insist that the part of the set-off not included in the first replication equals the plaintiff's demand. A replication of the Statute of Limitations is

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in confession and avoidance; *Gale v. Capern*, 1 Ad. & E. 102; s. c. 3 Law J. Rep. (N. S.) K. B. 140; and the defendant here alleges that his demand, recoverable at law, equals the plaintiff's, and the plaintiff denies that the defendant has such equal demand recoverable against him. The defendant does not aver that the residue of his set-off, after that part to which the plaintiff replies the Statute of Limitations, equals the plaintiff's demand. *Blakesley v. Smallwood* is an authority for the plaintiff.

Peacock, in reply. If the defendant is limited by the allegation of equality, then the replication is double, as either answer would destroy the equality.

Cur. adv. vult.

Judgment was now delivered by

ALDERSON, B. This case was argued a very long while ago. It has been delayed in consequence of a difference of opinion amongst the judges, which has not altogether been removed even at the present moment. The question was whether the replication was good on special demurrer. The gist of the plea of set-off is, that the plaintiff is indebted to the defendant in a sum equal at least to that which he is seeking to recover in this action. The plaintiff in his replication endeavors to meet this plea by dividing his demand (not the set-off) into two parts. As to 49*l.* 16*s.* 10*d.*, part of his demand, the plaintiff says that the set-off, so far as relates to that sum, that is, to that portion of his demand, is barred by the Statute of Limitations; and so far as relates to the residue of his demand, the plaintiff says he is not indebted *modo et forma*. Now, in the first place, though that part of the replication which insists on the statute purports to give an answer to the set-off only so far as relates to 49*l.* 16*s.* 10*d.*, part of the plaintiff's demand, yet, what is asserted is, that the causes of set-off are barred by the statute; and if this be so, that part of the replication, though purporting to be replied only to 49*l.* 16*s.* 10*d.*, is, in truth, a replication to the whole plea; for, if the causes of set-off are barred by the statute so as not to be an answer to the plaintiff's demand of 49*l.* 16*s.* 10*d.*, so neither can they be to the rest of his claim. But, suppose this objection to be got over, and that the replication should be read as if it had been a statement that as to 49*l.* 16*s.* 10*d.*, parcel of the plaintiff's demand, the causes of set-off to a like amount are barred by the statute, this is obviously no answer at all to the defendant. It may be that items to that amount may be barred by the statute, and yet there may remain a set-off not barred sufficient to equal the plaintiff's demand which may be established by the proof. The only course open to the defendant on this replication, supposing his set-off to consist of sums not barred by the statute equal to the plaintiff's demand, and also of sums to the amount of 49*l.* 16*s.* 10*d.*, barred by the statute, would be, that he should rejoin by stating, in the nature of a new assignment, (which, perhaps, considering the peculiar nature of a plea of set-off, might, if justice required it, be allowed,) that the sums he intended to set

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off against the 49*l.* 16*s.* 10*d.*, parcel of the plaintiff's demand, were other and different from the sums barred by the statute. But, even if such a rejoinder would not be bad, as being a departure from the plea, or on any other ground, still the plaintiff has no right by such a replication to drive the defendant to take issue on matters which may be immaterial and which were not stated in the plea. What the defendant undertook to prove was, that his cross demand in its integrity equalled the plaintiff's whole claim when proved, not that he had particular matters of set-off against particular parts of the plaintiff's original demand. The course of pleading attempted by the plaintiff leads to this anomaly, that though there are two issues to be tried, each going only to a part of the cause of action, namely, first, whether there is a good set-off to part of the cause of action arbitrarily selected by the plaintiff in his replication, and secondly, whether there is a good set-off to the residue; yet, if either of these issues is disposed of in favor of the plaintiff, it entitles him to judgment on the whole plea and the whole cause of action, and makes the result of the issue as to the other part wholly immaterial. This is clearly anomalous and bad. The proper course for the plaintiff to have followed in this case is pointed out by my brother Parke, in *Fairthorne v. Donald*. He should have replied, that part of the subject matter of the set-off was barred by the statute, and that he is not indebted to the defendant in any sum which (with the part so barred) equals the amount of his demand. On pleadings so constructed, the defendant would have been bound to support his defence by showing a set-off not barred by the statute, and which should equal or exceed the plaintiff's demand, which might be established by the proof. This is precisely what the plea bound him to prove, and no more. With respect to the case of *Blakesley v. Smallwood*, it may be observed the court there proceeded on the ground that the plaintiff had improperly concluded what was in fact a mere traverse with a verification. The replication there did not, as it does here, attempt to divide the causes of action, but only the causes of set-off, into two parts; and the court there cautiously abstained from saying that the replication would have been bad if it had contained proper conclusions to its different parts. If the plaintiff chooses to amend on the usual terms, we think he should be at liberty to do so; but otherwise, the judgment of my brother Platt differing in this respect from that of my brother Parke and myself, who are the majority of the court, we think the judgment should be for the defendant.

Judgment accordingly.

Ellen v. Topp.

ELLEN v. TOPP.¹

Easter Term, April 15, 1851.

Apprentice — Indenture — Dependent Covenants.

By an indenture of apprenticeship, an infant, with the consent of his father, put himself apprentice to a person therein described as "an auctioneer, appraiser, and corn-factor," "to learn his art and with him after the manner of an apprentice to serve" for a specified period. The father was party to the indenture, and entered into the usual covenants for the performance of its terms by the apprentice:—

Held, that the fact of the master's having, during the continuance of the apprenticeship, relinquished the trade of corn-factor, was an answer to an action of covenant brought by him against the father for a desertion of his service by the apprentice; and this, though the father had by parol consented to the discontinuance of that trade, and allowed the son to continue to serve after it.

Sed semble, that if the apprentice had served the whole period agreed on, and had the benefit of instruction as such in two of the trades, it would be no answer to an action by the master for the apprentice fee, that he had during the apprenticeship discontinued the third trade.

THIS was an action of covenant on an indenture of apprenticeship, bearing date the 21st of July, 1846, whereby Richard Topp, an infant of the age of sixteen years or thereabouts, by and with the consent of his father, the defendant, put himself apprentice to the plaintiff, therein described as an auctioneer, appraiser, and corn-factor, to learn his art, and with him after the manner of an apprentice to serve from the 1st of July, 1846, for the term of five years. There was an apprenticeship fee of 70*l*. The indenture was in the usual form, with the usual covenants, concluding thus: "And for the true performance of all and every the said covenants and agreements, either of the said parties bindeth himself unto the other by these presents." The declaration alleged that by virtue of the said indenture, Richard Topp entered and was received into the service of the plaintiff as such an apprentice; and assigned as a breach that "the said Richard Topp did not nor would faithfully serve the plaintiff according to the tenor and effect, true intent and meaning of the said indenture, but on the contrary thereof the said Richard Topp during the said term of five years, &c., to wit, on the 22d of July, 1849, did unlawfully absent himself from the service of the plaintiff, and hath from thence hitherto remained and continued absent from the service of the plaintiff, contrary to the tenor and effect of the said indenture and of the said covenant of the defendant, &c., to the damage, &c." To this declaration the defendant (after setting out the deed on oyer) pleaded, that the plaintiff, at the time of the making and executing of the said indenture, exercised the art and carried on the business of an auctioneer, appraiser, and corn-factor, and that the apprenticeship and covenants aforesaid were made with the plaintiff as such auctioneer, appraiser, and corn-factor, and not otherwise, and that after the making of the indenture, and before the accruing of the cause of action, to wit, on the 16th of June, 1848,

¹ 15 Jur. 451.

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the plaintiff voluntarily and of his own free will gave up, relinquished, abandoned, and ceased to exercise and carry on, and hath not at any time since exercised or carried on, the art and business of corn-factor, &c.

Replication, that the plaintiff relinquished his business of a corn-factor with the full knowledge and consent of the defendant, and that from the time of such relinquishment continually until the accruing of the cause of action, the said Richard Topp, with full knowledge of such relinquishment, continued with the consent of the defendant to serve the plaintiff under the said indenture, &c. To this replication there was a special demurrer on several grounds; chiefly, that it was a departure from the declaration, and that the contract of indenture mentioned in the declaration and plea could not be altered by the parol consent set up in the replication: and the case was argued in Easter term, 1850, before Pollock, C. B., Parke, Rolfe, and Platt, BB., by

Taprell, for the plaintiff, and

Macnamara, for the defendant.

The court took time to consider their judgment, and afterwards said that some difference of opinion existing among them on the points raised, and the constitution of the court having been altered by the removal of Rolfe, B., to the post of vice chancellor, the matter had better be re-argued. It was accordingly argued a second time in last Hilary term, before Pollock, C. B., Parke, Alderson, and Platt, BB.

Macnamara, for the defendant. The replication is an ill-considered one.

[*Pollock*, C. B. The case turns on the validity of the plea.]

Yes; and no objection can be taken to it except such as could be taken on general demurrer. Whether the language of the indenture which speaks of the plaintiff as an "auctioneer, appraiser, and corn-factor," is to be understood as describing three distinct trades, or one trade made up of three different elements, the defendant's covenant was that his son should serve the plaintiff while acting in those three capacities; and the breach alleged is that the son did not serve according to the tenor and effect of the indenture. But the master, by giving up one of the three, has prevented the apprentice from so doing; and it is an established principle of law that a party cannot sue for the violation of a covenant, the performance of which has been rendered impossible by his own act. *Com. Dig.*, "Condition," L. 4 and M. 3. *Co. Litt.* 206, b, 221. *Hughes v. Humphreys*, 6 B. & Cr. 680. *Winstone v. Linn*, 1 B. & Cr. 460. *Robson v. Drummond*, 2 B. & Ad. 303. *Bryant v. Beattie*, 4 Bing. N. C. 254. *Keys v. Harwood*, 2 C. B. 905. The relation of apprenticeship involves a personal trust; the apprentice is bound to the master from confidence in his integrity and ability, *R. v. Peck*, 1 Salk. 66; *Baxter v.*

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Burfield, 2 Str. 1266, and on the understanding that he is not merely to teach the apprentice the trades which he professes, but instruct him practically in their exercise. If this be so, the plaintiff's following these three trades is an entire and indivisible consideration for the service of the apprentice; his continuing so to do is a condition precedent to his maintaining any action on this indenture, and an abandonment of one is for this purpose an abandonment of all. The case is analogous to that of landlord and tenant, where if the lessee be evicted from a portion of the demised premises, the rent shall not be apportioned.

[*Alderson*, B. Suppose a man's business deserts him.]

That is different from his giving it up of his own accord. The question as to what covenants are dependent and what are not, is discussed in 1 Wms. Saund. 320, *b*, &c.; 2 Smith's Lead. Cas. 9; and is further illustrated by the cases of *Boone v. Eyre*, 1 H. Bl. 273, note (a.) 2 W. Bl. 1312. *Campbell v. Jones*, 6 T. R. 570. *Glazebrook v. Woodrow*, 8 T. R. 366. *The Duke of St. Alban's v. Shore*, 1 H. Bl. 279. *Large v. Cheshire*, 1 Vent. 147. *Whitcher v. Hall*, 5 B. & Cr. 269. *Winstone v. Linn*, 1 B. & Cr. 460. *Kingdom v. Cox*, 5 C. B. 522. *Planché v. Colburn*, 8 Bing. 14. *Fitt v. Cassanel*, 4 Man. & G. 898. *Rez v. St. Martin's, Exeter*, 2 Ad. & El. 655. *Oliver v. Fielden*, 4 Exch. 135. *Chanter v. Leese*, 4 M. & W. 295. 5 M. & W. 698. *Lloyd v. Blackburn*, 1 Dowl. N. S. 647.

[*Parke*, B. The principle laid down by Serjeant Williams is, that the defendant might have refused to take the consideration, but if he takes a part, natural equity requires that he should pay a portion of the price. Mr. Addison, in his able book on Contracts, (p. 988,) says that we are to see what is the substantial part of the contract: but that raises a great difficulty; for how can the court tell which is the substantial part of a contract where the parties stipulate for three or four different things? Suppose this were an action for the payment of the apprentice fee, brought after the term of apprenticeship was ended, would it be an answer that during the term the plaintiff had discontinued one of the trades?]

All such questions must be determined according to the obvious intention and meaning of the parties and the good sense of the case. Thus, a short temporary cessation from instructing, even in all the three trades, would not put an end to the contract, though the total cessation of one would. Another test as to whether covenants are independent or not is to see if the broken covenant could be compensated for in damages, without interfering with the rest of the contract. *Ford v. Tiley*, 6 B. & Cr. 325. *Holme v. Guppy*, 3 M. & W. 387. *Galsworthy v. Strutt*, 1 Exch. 659.

[*Alderson*, B., referred to *Kemble v. Farren*, 6 Bing. 141.]

Now the indenture in this case contains no provision for liquidated damages in the event of a partial breach; and a young man in choosing his trade is determined by many circumstances, the force of which no court or jury could estimate; as for instance, whether it is one likely to be successful in a particular neighborhood, whether the neighborhood may not be so poor that a livelihood could only be obtained in

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it by following three trades at once, whether the trade in question is one, the having served an apprenticeship to which will give a title to the freedom of a corporation, &c. The trade abandoned by the master might be the most valuable to the apprentice. Thus, a man who is solicitor and notary might give up the former; or a watchmaker and jeweller give up that of watchmaker. Even supposing the continuance of the three trades not to be a condition precedent to the service of the apprentice, instruction in the three is a *concurring* consideration with that service; and if so, the plaintiff must aver himself ready and willing to perform his part of the contract. Now, readiness and willingness necessarily imply ability, and the want of that appears on this record. The courts ought, in transactions of this kind, to lean as much as possible in favor of the apprentice; for although in the present case his father is living and capable of attending to his interests, it often happens that the father is dead, or out of the country, or too far away to be of any assistance. Besides, the master generally receives an apprentice fee *in presenti* for a prospective benefit which he is to confer on the apprentice. It was once thought that indentures of apprenticeship could only be dissolved by deed; *Rex v. Daniel*, 6 Mod. 182; *Castor v. Aickles*, 1 Salk. 68; that was afterwards departed from, and it was held they might be discharged by mutual consent, and giving up or cancelling the indentures; *Rex v. Harberton*, 1 T. R. 139; but the limitation has been since affixed that this only holds where the discharge from the apprenticeship is for the benefit of the infant. *Rex v. Mountsorrell*, 3 Mau. & S. 497. *Rex v. Wigston*, 3 B. & Cr. 484.

Taprell, contra. This case involves a principle of considerable importance, and depends on the nature of the relation existing between a master and his apprentice. *Personal* instruction by the master is no part of the essence of the contract of apprenticeship; for the relation between the parties is that of teacher and scholar, or of parent and child, rather than that of master and servant. Thus, it is not absolutely avoided by the death of the master; Bac. Ab., "Master and Servant," G.; Vin. Ab., "Apprentice," G.; *R. v. Peck*, 1 Salk. 66; for the executor may continue to instruct the apprentice, *Reg. v. Stockland*, 1 Dougl. 70, or may assign him to some one else, *Rex v. Barnsley*, 1 Mau. & S. 376; *Rex v. St. Martin's, Exeter*, 2 Ad. & El. 655, per Littledale, J. So service by consent of the master, with another master, even though of a different trade, is a sufficient service under the indenture; Vin. Ab., "Apprentice," K., pl. 31; *Rex v. Clapham*, Burr. S. C. 266; *Rex v. Gwinear*, 1 Ad. & El. 152. And until the 69 Geo. 4, c. 16, s. 49, the bankruptcy of the master did not discharge the apprentice; 1 Str. 582; 2 Ld. Raym. 1352; though it is obvious the master could not carry on his trade unless he got his certificate. Neither is the apprenticeship determined by the master running away, *Rex v. Mountsorrell*, 3 Mau. & S. 497; *Rex v. Foulness*, 6 Mau. & S. 351, or declining business, *Rex v. Holy Trinity*, 3 T. R. 605; *Rex v. Chilverscoton*, 8 T. R. 182, because he may instruct by deputy.

[*Pollock*, C. B. Those cases were decided *diverso intuitu*, the ques-

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tion in them being whether the service was sufficient for the purpose of gaining a parochial settlement.]

Another principle arising out of the relation of master and apprentice is, that the time of the apprentice is the time of the master, who is entitled to the entire produce of his labor. *Barber v. Dennis*, 1 Salk. 68. *Ashcroft v. Bertles*, 6 T. R. 652. *Lightly v. Clonulton*, 1 Taunt. 112. *Foster v. Stuart*, 3 Mau. & S. 200, per Le Blanc, J. The court will take judicial notice that there are here three separate trades; auctioneer is mentioned in the 8 & 9 Vict. c. 15, s. 2; appraiser in the late stamp act; and corn-factor in the 7 & 8 Geo. 4, c. 58, s. 12. Now a plea which is bad in part is bad altogether; 1 Wms. Saund. 28; and even as regards the trade of corn-factor, this plea only alleges that the plaintiff ceased to exercise that trade, not that he has ceased to instruct the apprentice in it; which he may still be doing either personally or through the agency of another. *Hughes v. Humphreys*, 6 B. & Cr. 680, per Holroyd, J. But even supposing the defendant to have broken his agreement so far as relates to that trade, the covenants in an indenture of apprenticeship are independent of each other; *Winstone v. Linn*, 1 B. & Cr. 460; and unless the breach of contract extends to the whole of the consideration, the covenant is not a condition precedent, but a distinct covenant, the breach of which may be compensated in damages. 1 Wms. Saund. 320, c. *Davidson v. Gwynne*, 12 East, 389. *Stavers v. Curling*, 3 Bing. N. C. 355. *Franklin v. Miller*, 4 Ad. & El. 599. *Cutler v. Bowen*, 11 Q. B. 973. It might often be for the benefit alike of master and apprentice that the master should set up in an additional trade or relinquish one of those which he follows; but if in consequence of such a change the apprentice is injured, he may be discharged from his apprenticeship under the 5 Eliz. c. 4, s. 35, 1 Wms. Saund. 316, note 3; or his father maintain an action against the master. There is no averment in this plea that the trade of corn-factor was the principal trade followed by the plaintiff, or that which formed the chief inducement for the apprentice's entering into his service. In many of the authorities cited by the other side the consideration was indivisible; and notwithstanding his lease contains a covenant to repair, a tenant who is evicted from part of premises may maintain an action against his landlord. *Morrison v. Chadwick*, 7 C. B. 283. But if the court should think the plea good, so is the replication. It is no departure from the declaration, for it supports it by showing that the defendant's covenant is still in full force and operation. Even supposing the indenture void by the master giving up a portion of his trade — for the mere absenting himself by the apprentice is not a sufficient act of avoidance, *Smedley v. Gooden*, 3 Mau. & S. 189 — its validity may afterwards be set up by an act *in pais* such as is here alleged, namely, the apprentice continuing to serve the master. Where a master dies and the apprentice continues to serve under the deed with his executor, the executor may sue on any of its covenants. So where a husband and wife made a lease of the lands of the wife, and the husband died and the wife accepted the rent, she was bound by the lease at com-

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mon law; for by the receipt of rent after her husband's death the lease was affirmed. 2 Wms. Saund. 180.

Macnamara, in reply. The replication is bad, first, because it attempts to keep up this indenture in an altered form, contrary to the established rule of law, that an instrument under seal can only be varied by an instrument under seal. The case of the executor of a deceased master enforcing covenants is inapplicable; for there the contract being altered by the act of God, may be considered in force for some purposes; whereas here, the alteration was by the party who seeks to enforce it. The replication is also bad as being a departure from the declaration, for the gist of the breach is, that the apprentice did not serve the plaintiff in his character of auctioneer, appraiser, and corn-factor, whereas the replication sets up that he did not serve him as corn-factor, and shows an excuse for it. *Winstone v. Linn*, already cited, seems an authority against this replication. As to the plea. In settlement cases, the court always endeavors to support the settlement, where the terms of the indenture of apprenticeship have been departed from with the consent of the apprentice and his father; and the bankruptcy of the master does not incapacitate him from following his trade. If it be true that the time of the apprentice is the time of the master, then reciprocally the time of the master is that of the apprentice. The remedy given by the 5 Eliz. is altogether cumulative.

Cur. adv. vult.

The judgment of the court was now delivered by

POLLOCK, C. B. This was an action on an indenture of apprenticeship by the master against the father of the apprentice, the father having been party to the indenture. The breach assigned is, that the apprentice did not, nor would faithfully serve the plaintiff according to the tenor and effect of the indenture, but on the contrary did, on the 22d day of July, 1849, unlawfully absent himself from the service of the plaintiff, and has thenceforth continued absent from such service. [The lord chief baron here stated the pleadings and proceeded.] On the part of the plaintiff it was scarcely contended that the replication could be supported. It is obviously bad. Such parol consent cannot entitle the plaintiff to maintain an action of covenant in this form, which is founded entirely on the deed under seal. The question, therefore, resolves itself into the only question really argued before us, which was, whether the plea was good.

On the part of the plaintiff it was contended that the plea afforded no answer to the plaintiff's cause of action, on two grounds; first, Mr. Taprell contended that all which the plaintiff undertook to do was to teach three trades, and that he might continue to do this although he had ceased to carry on one of them, and that the plea contained no averments that he was unable so to do.

But this objection is ill founded. The breach complained of is, that the apprentice did not, nor would serve the plaintiff according to

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the tenor and effect and true intent and meaning of the indenture. Now, looking to the indenture, we see that the real engagement was this: the son, Richard, with the consent of the defendant, his father, "put himself apprentice to the plaintiff," described in the indenture "as auctioneer, appraiser, and corn-factor," "to learn his art and with him after the manner of an apprentice to serve;" and then the defendant, at the end of the deed, bound himself to the plaintiff for the due performance of that engagement. What then was it which the defendant covenanted that his son should do? To become the plaintiff's apprentice to learn his art, i. e., the art of an auctioneer, appraiser, and corn-factor, and to serve with him after the manner of an apprentice. Now, service with a man *after the manner of an apprentice* imports, according to the meaning of those words as ordinarily understood, that the party served should be carrying on the trade which the apprentice is to learn; otherwise, the one is teaching and the other learning the trade, not as master and apprentice, but as instructor and pupil. When, therefore, the one party ceases to carry on the trade, he by his act makes it impossible for the other to serve him after the manner of an apprentice; and he cannot be heard to complain that the other party has not done that which he has wilfully made it impossible that he should do.

The other objection taken by Mr. Taprell was, that the carrying on all the three trades was not a condition precedent to the plaintiff's right to recover; that his omission or refusal to carry on any one must be the subject of a cross action.

This objection is founded on one of the rules for determining when covenants are dependent on each other; which is laid down in *Boone v. Eyre*, 1 H. Bl. 273, note *a*, and followed in *Campbell v. Jones*, 6 T. R. 570, and other cases collected in the note to 1 Wms. Saund. 320, *c*. That rule is, that when a covenant goes to part of the consideration on both sides, that is, forms a part of the consideration on the plaintiff's side for the defendant's covenant on the other, and a breach of such covenant may be paid for in damages, and the whole of the remaining consideration has been had by the defendant, the covenant is independent, and the performance of it is not a condition precedent.

The reason of the decision in these cases, as is observed by the learned editor, is, that "where a person has received a *part* of the consideration for which he entered into the agreement, it would be unjust that because he had not had the *whole*, he should therefore be permitted to enjoy that part without either paying or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration."

It is remarkable that, according to this rule, the construction of the instrument may be varied by matter *ex post facto*, and that which is a condition precedent when the deed is executed may cease to be such by the subsequent conduct of the covenantee in accepting less; as in the cases referred to, the defendant, in the first, might have

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objected to the transfer if the plaintiff had no good title to the negroes and refused to pay; in the second, might have objected to the payment if the plaintiff had refused to transfer the patent, though he had been willing to teach the art of bleaching. But this is no objection to the soundness of the rule, which has been acted upon, though there is often a difficulty in its application to particular cases, and it cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been had by the defendant. That residue *must be the substantial part of the contract*, and if, in the case of *Boone v. Eyre*, two or three negroes had been accepted, and the equity of redemption not conveyed, we do not apprehend that the plaintiff could have recovered the whole stipulated price, and left the defendant to recover damages for the non-conveyance of it.

Whether the rule can be applied to the present case has been a matter of great doubt in the minds of some of us; but after much consideration we agree that it is not applicable. If this had been an action on a covenant to pay an apprentice fee at the end of the term, and the apprentice had served the whole period, and had the benefit of instruction as such in two of the trades, it would, we are disposed to think, have been no answer to the action that the plaintiff had discontinued one. But this is an action for not continuing to serve as an apprentice; and although the later services of an apprentice are much more valuable than the early, and are in part a compensation to the master for his instruction in the commencement of the apprenticeship, and so are analogous in some degree to an apprentice fee payable *in futuro*, yet the immediate cause of action is the breach of the contract to serve, and the obligation to serve depends upon the corresponding obligation *to teach, as an apprentice*; and if the master is not ready to teach in the very trade which he had stipulated to teach, the apprentice is not bound to serve. To this particular covenant to serve, the relative duty to teach seems to us to be directly a condition precedent, and we are not able to distinguish between the three trades of auctioneer, appraiser, and corn-factor, so as to say that one is more the substantial part of the contract than another.

As the plaintiff, by his own fault, has disabled himself from acting as a master in all the three trades, he has no right to complain of the defendant's son refusing to continue to serve in any.

Our judgment will therefore be for the defendant.

Judgment for the defendant.

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WALSH v. SOUTHWELL & others.¹

Hilary Term, January 31, 1851.

Poor Rate — Costs, Distress for — Tender — Power of Overseers to appoint Deputy to execute Warrant — 12 & 13 Vict. c. 14.

In an action of trespass the defendants pleaded in justification that while A and four others were overseers of the township of B., and C and D church-wardens, the plaintiff was duly assessed as an inhabitant of the township in the sum of 10s. 4d. for the poor rate; that the same not being paid on demand, the plaintiff was duly summoned before two justices; that he did not appear, but that the said church-wardens and overseers appeared by the said A, and the justices, after proof of the making of the rate, &c., did, pursuant to the statute, issue their warrant, directed to the overseers of the township of B., to levy by distress upon the goods of the plaintiff the sum of 10s. 4d. and the further sum of 6s. for costs incurred by the said church-wardens and overseers; that the said warrant was delivered to T. B. C. as such overseer to be executed, by virtue of which warrant the defendants, as servants of the said T. B. C. as such overseer and at his command, and for the purpose of executing such warrant, as such servants, committed the trespasses complained of. Verification.

The plaintiff replied that before execution or notice of the warrant he tendered to T. B. C. the amount of the rate:—

Held, upon demurrer, that the replication was bad for not averring a tender of the costs:—

Held, also, that the plea was good, as the justices had power under the 12 & 13 Vict. c. 14, to award the costs to the parties applying for the warrant, and the overseers had a right to appoint deputies for the execution of the warrant.

TRESPASS for entering the dwelling-house of the plaintiff and taking his goods.

Plea — That before and at the time of making the rate hereinafter mentioned, and when, &c., the said dwelling-house was within and part and parcel of the township of Blackburn, and that W. Mellor and E. Fisher were the church-wardens, and C. Parkinson, J. Alston, T. Thwaites, J. Forrest, and T. B. Chadwick, were the overseers of the said township; that before, &c., to wit, &c., the plaintiff, as an inhabitant and occupier of a house and premises in the said township, was duly rated and assessed in respect of the said house and premises for the necessary relief of the poor of the said township and for other purposes, in the sum of 10s. 4d., which said sum was afterwards and before, &c., duly demanded of him, and payment thereof refused. The plea then stated a summons from a justice of the county of Lancaster to the plaintiff to appear and show cause why he should not pay the same; that the said summons was duly served upon the plaintiff, and that the said church-wardens and overseers by the said T. B. Chadwick, as one of the overseers, appeared before W. Earles and J. Earles, two of the justices for the county of Lancaster, at the time and place mentioned in the summons; that the service of the summons was then duly proved, and also the making of the rate and the assessment of the plaintiff, and the demand and non-payment; that thereupon the said justices then and there, to wit, &c., according to the form of the statute, duly made and issued their

¹ 20 Law J. Rep. (N. S.) M. C. 165.

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warrant in writing under their hands and seals directed to the overseers of the poor of the township of Blackburn, in the county of Lancaster, and to the constables of the said township of Blackburn, and to all other peace officers in the said county, and thereby required them, amongst other things, forthwith to make distress of the goods and chattels of the plaintiff, and if within the space of five days after the making of such distress the said sum of 10s. 4d., the amount of the said rate, and a certain other sum of money, to wit, the sum of 6s. for costs incurred by the said church-wardens and overseers, together with the reasonable charges of taking and keeping the said distress, should not be paid, that then the said church-wardens and overseers should sell the goods and chattels of the plaintiff so making such default as aforesaid, and should, out of the money arising from such sale, retain the said several sums of 10s. 4d. and 6s., making together the said sum of 16s. 4d., and should render to the plaintiff the overplus, the reasonable charges of taking, keeping and selling the said distress being first deducted; and if no such distress as aforesaid could be found, that the aforesaid church-wardens and overseers should certify the same to the said last-mentioned justices, to the end that such further proceedings might be had therein as to the law doth appertain; which said warrant afterwards, to wit, &c., was delivered to the said T. P. Chadwick, so being such overseer as aforesaid, in due form of law to be executed, and by virtue of such warrant the defendants, as the servants of the said T. P. Chadwick, so being and as such overseer as aforesaid, and by his command and not otherwise, and for the purpose of executing such warrant, as such servants and by such command as aforesaid, to wit, at the said times when, &c., broke and entered the said dwelling-house of the said plaintiff in which, &c., (the outer door thereof then being open,) and committed the said other supposed grievances therein, and at the said times when, &c., seized, took, and distrained the said goods and chattels in the declaration mentioned. The plea then stated that there was no overplus. Verification.

Replication, that before the said distress, he, the plaintiff, tendered to the said T. P. Chadwick the sum of 10s. 4d., being the amount of the assessment, which the said T. P. Chadwick then refused to accept, and that after the said tender, and before the distress, no demand was made, and he, the plaintiff, had not, before making the tender, notice of the making and issuing of the said warrant by the said justices for the distress and sale of the goods and chattels of the plaintiff. Verification.

Demurrer and joinder.

Crompton, in support of the demurrer. The replication is bad, as a tender of part of a sum due upon a warrant of distress is insufficient. *Cotton v. Kadwell*, 2 Nev. & M. 399. The warrant may now be for the costs as well as for the rate under the 12 & 13 Vict. c. 14.¹

¹ Sect. 1 enacts, "That it shall be lawful hereafter for all justices of the peace, if in their discretion they shall so think fit, in any warrant of distress they shall make

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The form of warrant given by the statute has been followed. The court then called upon

Pashley to support the replication. Costs could be awarded prior to the 12 & 13 Vict. c. 14, under the 18 Geo. 3, c. 19, but they could not be included in the same distress warrant under the 43 Eliz. c. 2. *Skingley v. Surridge*, 11 Mee. & W. 503; s. c. 12 Law J. Rep. (N. S.) M. C. 122. *Clark v. Woods*, 2 Exch. Rep. 395; s. c. 17 Law J. Rep. (N. S.) M. C. 189.

[*Crompton*. The 18 Geo. 3, c. 19, was repealed by the 11 & 12 Vict. c. 43.

Parke, B. What objection can there be to the warrant which was made under the 12 & 13 Vict. c. 14?]

There is no statement that the justices adjudged the costs under their discretionary power, and there was no notice to the plaintiff of that discretion having been exercised, and therefore it was sufficient for him to tender the amount of the rate. Then, the plea is also bad. Blackburn is a township, and the church-wardens have nothing to do with the poor rate. 13 & 14 Car. 2, c. 12, s. 21, *The King v. The Justices of the North Riding*, 6 Ad. & E. 863; s. c. 6 Law J. Rep. (N. S.) M. C. 110. Here the application was by the church-wardens and overseers, and the costs might have been partly incurred by the church-wardens. Further, the warrant was no justification to the defendants as servants of the overseers, for it should have been executed by one of the persons to whom it was directed. There is power to appoint assistant overseers by the 59 Geo. 3, c. 12, s. 7. *Points v. Attwood*, 6 Com. B. Rep. 38; s. c. 18 Law J. Rep. (N. S.) C. P. 19; and by the 59 Geo. 3, c. 170, s. 10, the overseers may employ particular persons to remove paupers, but there is no authority

and issue for the levying of any sum or sums to which any person or persons is or are now, or may hereafter be, rated or assessed in or by any rate or assessment for the relief of the poor, or for the highways in England or Wales, or in or by any other rate or assessment which by law now or hereafter is or shall be directed to be enforced or recovered in the same manner as a poor rate, or in any warrant for the levying of any arrears of the same, to order that a sum, such as they may deem reasonable for the costs and expenses which such overseers or surveyors, or the persons applying for such warrant, shall have incurred in obtaining the same, shall also be levied of the goods and chattels of the person or persons against whom such warrant shall be granted, together with the reasonable charges of the taking, keeping, and selling of the said distress."

Sect. 6 enacts, "That in all cases where any proceedings have been or shall hereafter be taken, to compel payment of any sum for which any such person is or shall be so rated or assessed as aforesaid, if at any time before such person shall be committed to, and lodged in, prison for non-payment thereof, or for or by reason of its being returned to such warrant of distress as aforesaid, that there are no goods or chattels, or no sufficient goods or chattels of such person whereon the same may be levied as aforesaid, such person shall pay or tender to the church-wardens or overseers of the poor, or any of them, or to the surveyor of highways respectively, or other person authorized to collect or receive such rate, the sum so sought to be recovered, together with the amount of all costs and expenses up to that time incurred in the proceedings so taken to compel payment thereof as aforesaid, then and in every such case the person to whom such sum and costs shall be so paid and tendered shall receive the same, and thereupon no further proceedings for the recovery of the same shall be had or taken."

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for them to execute ordinary warrants by deputy. It was much discussed whether, under the 6 Vict. c. 18, s. 100, which imposed upon the postmaster of certain post-offices certain duties as to notices of objection to persons on the registry of voters, his clerk or deputy could act. *Cooper v. Coates*, 5 Man. & G. 98.

[*Parke, B.* That case might certainly have been decided either way.]

A constable cannot appoint a deputy, except in case of necessity. *Phelps v. Winchcomb*, 3 Bulst. 77. He cited, also, *Morrell v. Martin*, 8 Scott, 688; s. c. 11 Law J. Rep. (N. S.) M. C. 22. Bac. Abr. "Officer," L. *The Duchess of Norfolk v. Wiseman*, Year Book, 12 Hen. 7, 25, cited in *Wickham v. Hawker*, 7 Mee. & W. 77; s. c. 10 Law J. Rep. (N. S.) Exch. 159. *Points v. Attwood*.

Crompton, in reply. The stat. 12 & 13 Vict. c. 14, empowers the justices to give costs to the "persons applying for the warrant." Even if the church-wardens had no right to join, the statement of their taking part in the proceedings is only surplusage. A constable may appoint a deputy when by reason of sickness, absence, or otherwise he cannot execute the warrant himself. Bac. Abr. "Officer," L, and the cases there cited.

POLLOCK, C. B. I am of opinion there must be judgment for the defendants. The replication is clearly bad, as stating a tender of the rate without the costs. The plea is then objected to on the ground that the church-wardens and overseers cannot appoint a deputy. Every public officer can appoint a deputy for a mere ministerial act; and duties such as overseers and church-wardens often have to perform could not be performed at all if they could only act in person. Upon the authorities, and as a matter of convenience, a deputy or servant could be appointed for this purpose; and, on general demurrer, the plea is good.

PARKE, B. I am of the same opinion. The two objections to the plea are, first, that the overseers had no power to appoint a deputy to execute the warrant; the second, that costs are treated as having been incurred by the church-wardens and overseers. I think that although a deputy could not be appointed for some purposes, as, for making a church rate, this falls within the principle laid down in the case referred to in *Wickham v. Hawker*, and to be found also in Roll. Abr. 591. As to the second point, the statute gives power to award the costs to the party applying for the warrant, so that it is unnecessary to decide whether the Court of Queen's Bench were altogether right in the case cited, which excited a good deal of surprise at the time. But looking at the statute, the plea is good upon general demurrer.

ALDERSON, B. The replication is clearly bad, as stating a tender of 10s. 4d. only instead of the full amount due. If it had been necessary to decide that in townships church-wardens had nothing to do

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with the relief of the poor, I should have paused. But upon these pleadings, it is unnecessary to say more than that both the objections are untenable.

MARTIN, B. I am of the same opinion. The plaintiff was summoned to show cause why he should not pay the rate, and he did not appear or pay it, and therefore costs are to be paid by him for the expense of that proceeding, and the statute justifies what was done.

Judgment for the defendants.

IN THE EXCHEQUER CHAMBER.

JONES v. JOHNSON & another.¹

Hilary Term, January 31, 1851.

*Replevin against Justices — Costs as between Attorney and Client —
Municipal Act, 5 & 6 Will. 4, c. 76, s. 133.*

The 5 & 6 Will. 4, c. 76, which enacts, that in all actions against any person for any thing done in pursuance of the act, if judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, does apply to actions of replevin brought against magistrates to try the validity of a distress for borough rates.

WHITMORE moved for a rule calling upon the plaintiff to show cause why the master should not review his taxation of the defendants' costs.

An action of replevin had been brought by the plaintiff against the defendants, who were justices of the borough of Lichfield, to try the validity of a distress issued by the defendants against the goods of the plaintiff for the non-payment of a borough rate.² The case having come on to be tried, a special verdict was found, upon the argument on which the defendants obtained judgment. The master taxed the defendants' costs as between party and party, holding that the 133d section of the 5 & 6 Will. 4, c. 76, which gives defendants acting in pursuance of that act costs as between attorney and client, did not apply to actions of replevin.

Whitmore. The defendants are entitled to costs as between attorney and client. The question turns upon the meaning of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 133, which enacts that, in "all actions" brought against any person for any thing done in pursuance of that act, if judgment is given against the plaintiff, the defendant is to recover his full costs as between attorney and client. The words "all actions" would clearly apply to actions of replevin, and the mere fact of other parts of the clause not being applicable to

¹ 20 Law J. Rep. (N. S.) M. C. 169.

² See the case reported, 1 Eng. Rep. 418.

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actions of replevin makes no difference. The section ought to be liberally construed. *Fletcher v. Wilkins*, 6 East, 283, will be relied on by the other side.

Gray showed cause in the first instance. The taxation was correct, for replevin is not one of those actions against the costs of which the legislature has thought it right to indemnify the justices. The case of *Fletcher v. Wilkins* is precisely in point. It decides that replevin is not an action within the 24 Geo. 2, c. 44, s. 6, which protects constables, &c., and, amongst others, parish officers distraining for a poor rate, acting under a magistrate's warrant, from any action, until demand made, &c. That decision proceeded on the ground that an action of replevin was not an action for damages, but *in rem*. The words in that section are as large as those in the Municipal Act. Replevin is impliedly excepted from the words "all actions."

[*Alderson*, B. The subsequent words in the section, "such action," may mean such action only as the subsequent provisions are respectively applicable to.]

Whitmore, in support of the rule. The intention of the statute ought to be looked at. The object was, to protect persons acting under it against all liability to costs.

POLLOCK, C. B. This rule must be discharged. The question turns upon the construction of the 5 & 6 Will. 4, c. 76, s. 133; and the point is, whether, because in an action of replevin notice of action need not be given, therefore that action is to be excepted altogether from the 133d clause; that is, that the clause is to be applicable to actions of replevin so far only as it may be. The latter construction appears to me to be more grammatical and more consistent with the intention of the legislature. The words may well be read to mean that in actions where notice can be given it must be given, and in all actions where a party may recover costs he may recover them as between attorney and client.

PARKE, B. I am of the same opinion. The words must be understood according to their grammatical meaning to signify all actions in which notice can be given. The exception of the action of replevin in respect of notice is because it is impossible to give a notice in replevin.

ALDERSON and *MARTIN*, BB., concurred.

Rule absolute.

Homersham v. The Wolverhampton Waterworks Company.

HOMERSHAM v. THE WOLVERHAMPTON WATERWORKS COMPANY.¹

Hilary Term, January 29, 1851.

Incorporated Company — Implied Contract — Power of Directors.

A public company incorporated under act of Parliament cannot generally contract, except in the mode and upon the conditions specified either in the special act or the general act to which it is subject, such as the Companies Clauses Act, 8 & 9 Vict. c. 16.

The plaintiff, an engineer, entered into a contract under seal with the Wolverhampton Waterworks Company for the supply of machinery and the execution of works for the purposes of the company, with certain provisions as to extra work. The company was incorporated subject to the general provisions of the 8 & 9 Vict. c. 16; but by the special act, three directors were made a quorum. Much extra work was done by the plaintiff, with the sanction of the engineer of the company, but not according to the provisions of the contract; and after the work was done, and a claim made by him for payment of the price stipulated in the contract, together with a further sum for the extra work, a sum of 1000*l.* was paid to him on the general account; but no proof was given that this payment was made by the order of three directors:—

Held, in an action brought to recover for the extra work, that there was no evidence to go to the jury of any contract with the company.

Quære, whether upon proof that such payment had been made by order of three directors, any contract binding on the company would have been implied.

DEBT for goods sold and delivered, work and labor, money paid, and on an account stated.

Plea — Never indebted.

At the trial, before Pollock, C. B., at the sittings for Middlesex, after Michaelmas term, 1850, it appeared that the Wolverhampton Waterworks Company were incorporated by the 8 & 9 Vict. c. 135, and that a contract under seal had been duly made between the plaintiff and the company, for the supply by the plaintiff of certain pumps, engines, and machinery, according to a specification; and in the contract certain provisions were made as to extra work. The work contracted for was executed, and in addition much extra work, but without the provisions of the contract as to the last-mentioned work being complied with, although it was executed with the approval of the engineer of the company. Disputes arose between the plaintiff and the defendants, and the plaintiff sent in his account, claiming a considerable sum for the extra work, in addition to the sum contracted for. Under these circumstances, a sum of 1000*l.* was then paid to the plaintiff by the defendants on account; but it was not proved to have been paid by the order of three directors.

It was objected, that the defendants could not be bound, unless by an express contract under seal, or at least by the act of three directors, the 8th section of their act specifying that number as constituting a quorum; and that there was no evidence of any implied contract, even if there could be an implied contract to bind the company.

The learned judge thereupon nonsuited the plaintiff, reserving leave to him to move to set aside the nonsuit and enter a verdict.

¹ 20 Law J. Rep. (N. S.) Exch. 193.

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Sir F. Thesiger now moved accordingly.¹ Admitting the general principle so much discussed in *The Mayor, &c., of Ludlow v. Charlton*, 6 Mee. & W. 815; s. c. 10 Law J. Rep. (N. S.) Exch. 75, and in *Paine v. The Strand Union*, 8 Q. B. Rep. 326; s. c. 15 Law J. Rep. (N. S.) M. C. 89, that a corporation can only contract under seal, the present case falls within the exceptions there recognized as to contracts necessarily incident to the purposes and objects for which the corporation was created. The words of the 8 & 9 Vict. c. 16, s. 97,² show that the directors of such companies may contract by parol.

[*Parke*. That means directors at a meeting.]

If it be once admitted that they may make an express contract by parol, then the adoption and recognition of the work done for the benefit of the company must be held equivalent to an express contract. What is called an implied contract is merely evidence of an express contract; and even where there has been a deed entered into, if there be no remedy upon that, as for instance for failure of a condition precedent, an implied assumpsit will be raised by law. *Burn v. Miller*, 4 Taunt. 745. *Cooke v. Munstone*, 1 N. R. 351. Here, not only was the work done for the company, and upon their premises with the approval of their engineer, but a payment was made on account after the bill was sent in.

[*Alderson*, B. It was not proved to have been made by three directors.

Parke, B. In the judgment delivered by Rolfe, B., in *The Mayor, &c., of Ludlow v. Charlton*, the subject is put in its proper view: "We feel ourselves called upon to say, that the rule of law requiring contracts entered into by corporations to be generally entered into under seal, and not by parol, appears to us to be one by no means of a merely technical nature, or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required, as authenticating the concurrence of

¹ January 16, before POLLOCK, C. B., PARKE, ALDERSON, and MARTIN, BB.

² The 8 & 9 Vict. c. 16, s. 97, enacts, "That the power which may be granted to any such committee to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows: With respect to any contract which, if made between private persons, would be by law required to be in writing, and under seal, such committee or the directors may make such contract on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge the same. With respect to any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee, or the directors, may make such contract on behalf of the company in writing, signed by such committee, or any two of them, or any two of the directors, and in the same manner may vary or discharge the same. With respect to any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, such committee or the directors may make such contract on behalf of the company by parol only, without writing, and in the same manner may vary or discharge the same: and all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be; and on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought, either by or against the company, as might be brought had the same contracts been made between private persons only."

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the whole body corporate. If the legislature in electing a body corporate invest any member of it, either expressly or impliedly, with authority to bind the whole body, by his mere signature, or otherwise, then undoubtedly the adding a seal would be a matter purely of form, and not of substance. Every one becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act; and persons dealing with the corporation know that by such an act the body will be bound. But in other cases, the seal is the only authenticated evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerously attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing: either a seal, or some substitute for a seal which by law shall be taken as exclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine, by treating as valid contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience.”]

If the order for payment had been under seal, it would have been conclusive.

[*Parke, B.* Certainly not. Such a general payment would not have bound an individual as an admission of the whole amount claimed.]

The work may be considered as wholly unconnected with the special contract. Under the contract it could not have been recovered, because the order in writing of the engineer was a condition precedent. *Diggle v. The London and Blackwall Railway Company*, 19 Law J. Rep. (N. S.) Exch. 308, was decided solely upon the act incorporating the company, which was prior to the passing of the 8 & 9 Vict. c. 16.

[*Alderson, B.* By the 98th section of the Companies Clauses Act, the directors are bound to enter notes, minutes, or copies of all contracts made by them in a book. In the case of an implied contract this could not be done.

Cur. adv. vult.

Judgment was now delivered by

POLLOCK, C. B. This case stood over for the court to consider whether they would grant a rule or not. The application was made upon the ground that there was evidence to go to the jury of a new contract made apart and independent of the contract under seal. The action was not founded on a contract under seal, but was an action of debt for work done and materials found. In point of fact there had been a contract under seal; and there is no reason to doubt but that the plaintiff performed a great many other works that were not included in the contract, but which were to be considered as extras. There was, however, no evidence of any contract that would bind

the company. It was contended that under the 8 & 9 Vict. c. 16, s. 97, the company might be bound, not merely by a contract under seal, but by a contract made by three directors. But upon the facts, it turned out that there had been no meeting of three directors at which any order had been given at all. And though we are of opinion that under that section three directors are competent to bind the company, we are of opinion that the mere fact of the work being done is not sufficient, in the absence of any order of directors, or any thing from which a parol contract can be made, such as would bind the company; for the company is not bound by the mere order of the surveyor or the contract of one director. That being the state of things, it was proposed to prove that three directors adopted the contract, that is, adopted the works as they stood and had been performed, for there was a payment of 1000*l.* on account after the bill had been delivered, and after these works were made subject of a claim against the company. I mention the number three, because, by the special act of the Wolverhampton Waterworks Company, three directors were a quorum. It was contended that the payment of this money was such a recognition of the claim and such an adoption of the work of the contract that the defendants were bound. Without saying what would have been the effect of such a payment if it had been proved,—as to which, speaking for myself, I feel considerable doubt, and I believe that doubt some members of the court participate in,—it is sufficient for the present purpose to say that there was no evidence of any such payment upon that account. The payment was made in pursuance of a resolution in writing, and an attempt was made to prove what that was, but no notice had been given to produce the book, nor had a witness been called on by *sub-pœna duces tecum*, and the attempt to prove the payment of that money legitimately as the act of three of the directors undoubtedly wholly failed. The case, therefore, stands precisely in this position: that there was a contract under seal, that there was more work done than the plaintiff was bound to perform under that contract, but there was no evidence of the extra work having been either ordered by the company, sanctioned by the company, ratified, or adopted by the company. These clauses of restriction, and indeed the whole common law distinction, by which a corporation can only be bound by a contract under seal, being made for the benefit of subscribers to works of this description, that their interest may be protected, we are of opinion that they can only contract either under seal if they are a corporation, or if they are a body established under any special act of Parliament, they can only contract according to the terms by which the contract is entered into by the clause of the special act or of a general act which controls them. They cannot contract, except under the authority of these clauses. There was in this case no evidence of any contract that could be brought within any of these clauses. Therefore, we think the manner in which the case was disposed of at the trial was perfectly correct, and there is no ground for granting a rule to show cause why a different result should not be obtained.

Rule refused.

Newton v. Farrall.

NEWTON V. FARRALL.¹

Hilary Term, January 29, 1851.

Judgment as in Case of Nonsuit — False Statements of Defendant.

The defendant induced the plaintiff to discount his acceptance upon his representation that he was of age, and when it was presented for payment raised no objection on the ground of his infancy, but upon being sued upon it, pleaded infancy. The plaintiff then made inquiries, and having satisfied himself that the plea was untrue, joined issue and gave notice of trial; but he subsequently ascertained from documents in the defendant's possession that the plea was true, whereupon he countermanded notice of trial, and took no further proceedings:—

Held, that the defendant was not entitled to judgment as in case of nonsuit.

ASSUMPSIT on a bill of exchange against the defendant as acceptor.
Plea — Infancy.

The plaintiff not having proceeded to trial, the defendant had obtained a rule for judgment as in case of nonsuit, against which

Honyman now showed cause. It appears, upon the affidavits filed in answer to this rule, that the defendant had applied to the plaintiff to discount the bill for him; and upon his express assurance that he was of age, the plaintiff had discounted it accordingly, and when it was presented for payment the defendant raised no objection to paying it on the ground of being an infant, but stated that he was in difficulties, and that there were other bills out against him, and that he should be compelled to take the benefit of the Insolvent Act unless he could arrange with his creditors. The plaintiff then brought this action, and after the plea of infancy was pleaded, he made inquiries which resulted in the belief that the defendant's first statement was true, and accordingly issue was taken on the plea, and notice of trial delivered. Before the trial, however, in consequence of inspecting some documents in the defendant's possession under a notice to inspect and admit, the plaintiff was convinced that the plea was true, and the notice of trial was countermanded. The plaintiff further states that he fully believes that the defendant was of age when he accepted the bill, until after the notice of trial had been given, and that he stayed the proceedings as soon as he was convinced of his mistake. The defendant has thus obtained the money by false pretences, and the court will not give him the advantage of obtaining this rule. He must take the cause down to trial by proviso, but the plaintiff is willing to enter a *stet processus*.

Hawkins. There is no authority for refusing the rule for judgment under these circumstances. The plaintiff had full notice by the plea that the defendant intended to rely on the legal defence of infancy, and he ought not to have replied, but to have made sufficient inquiries at once. The information subsequently obtained is not to affect the defendant's right to judgment as in case of nonsuit.

¹ 20 Law J. Rep. (N. S.) Exch. 201.

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*Per curiam.*¹ Although there are no cases precisely in point, yet the analogy furnished by the cases in which the insolvency of the defendant has been held a sufficient reason for not proceeding with the cause, is in favor of the plaintiff. The plaintiff believed the statement of the defendant rather than his plea, and stayed the proceedings as soon as he ascertained the statement was false. We will not assist the defendant, and he must take the record down to trial by proviso. The rule will be discharged, unless a *stet processus* be agreed to by the defendant.

Rule discharged.

O'BRIEN v. KENYON & another.²

Easter Term, April 15, 1851.

Usury — 12 Anne, stat. 2, c. 16 — Policy of Assurance — Bonus.

Sir J. O., being much indebted, conveyed by indenture to trustees all his life interest in an estate, in trust, without the necessity of his consent, to convey the same to certain creditors. By another indenture of the 1st of July, 1823, between the trustees, Sir J. O., and the creditors, it was agreed that the trustees should hold the rents to pay annuities, and to divide the rents into two shares proportionate to the amount of the debts specified in two schedules to the deed, the portion appropriated to the first schedule to be paid to the creditors specified in that schedule equally in discharge of their debts, and after satisfying the debts and interest as to the shares appropriated to such creditors, to apply a competent sum in effecting and keeping on foot policies on the life of Sir J. O.; provided that any addition by way of bonus to the sums assured should belong to the creditors in the second schedule in addition to their debts, and be divided in proportion to their debts, notwithstanding that the principal and interest thereon might be discharged; and in consideration thereof, all the creditors gave to Sir J. O. leave to live any where without molestation to his person or goods by them, provided that if any creditor should molest him, his debt should be considered as released, and that Sir J. O. might plead such release in bar to any action. The trustees accordingly effected assurances, and after the death of Sir J. O. received the sum assured and also a bonus, the whole of which was claimed by Lady O., the widow, on the ground of the transaction having been usurious as to the creditors in the second schedule:—

Held, first, that the indenture of the 1st of July was not void for usury as to the provisions for the creditors in the first schedule.

Seemle, that the license to Sir J. O. was not a forbearing of the debt within the meaning of the 12 Ann. st. 2, c. 16, but was a relinquishment of his personal liability; and

Held, secondly, that the indenture was not void for usury as to the provision for creditors in the second schedule, nor was it in any respect void for usury:—

Held, also, that no action at law would lie at the suit of Lady O., against the trustees, to recover either the balance unapplied or the sums received from the insurance office; nor would such action lie even if the transaction were usurious as to the creditors in the second schedule.

THIS case, which was sent by the Vice Chancellor Wigram for the opinion of this court, stated in substance as follows:—

Sir John Osborne, being much indebted, conveyed by indenture, dated the 9th of April, 1822, to Lord Kenyon and Thomas Metcalfe,

¹ POLLOCK, C. B. PARKE, ALDERSON, and MARTIN, BB.

² 20 LAW J. Rep. (N. S.) Exch. 203.

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all his life interest in an estate in Bedfordshire, subject to certain annuities, in trust at any time, without the necessity of consent or concurrence on the part of Sir John Osborne, to convey, assign, apply, and dispose of the premises conformably to any advance the trustees should make, a power being given by Sir John Osborne in the deed for that purpose, to the creditors mentioned in the schedule to that deed, and, in such manner as the trustees in their discretion should think reasonable for that purpose, to convene a meeting of those creditors. The trustees caused a meeting of creditors to be held, and a resolution was come to that the clear surplus income of the trust estate should be conveyed by the said indenture, to be rendered available for the benefit of the creditors by a division into two parts in the manner expressed in the indenture of the 1st of July, 1823, between Lord Kenyon and Metcalfe of the first part, Sir John Osborne of the second part, and the creditors of the third part, made pursuant to that resolution. By the indenture, it was witnessed, that in pursuance of the said resolution and the order to carry into effect that resolution, it was agreed by and between the said parties thereto, that the trustees were to hold the rents in trust first to pay the expenses of the trust; secondly, the annuities charged on the estate; thirdly, to divide the rents into two shares proportioned to the amount of the debts specified in the two schedules to the deed; the portion appropriated to the first schedule to be paid to the creditors specified in that schedule equally in discharge of their debts, and after satisfying the debts and interest as to the shares appropriated to the creditors mentioned in the said schedule, in trust to apply a competent sum in effecting and keeping on foot in the names of the trustees a policy or policies on the life of Sir John Osborne in some office or offices in London and Westminster. It was further declared and agreed between the several parties that the trustees should hold the sums assured, and so much of the last-mentioned assurance and surplus rents as should not be wanting for the purpose of the insurances, in trust to apply the sum assured in payment of the several debts specified in the schedule ratably, and then to pay interest on those debts, and to apply the surplus rents not wanting to keep on foot the policies towards the payment of the principal of those debts, and to hold any residue that should remain in the hands of the trustees, in trust for Sir John Osborne and his executors. Then followed a proviso, that if any addition by way of bonus or otherwise should be made to any of the sums assured, that the sums to be received in respect of such addition should belong to the creditors named in the second schedule in addition to their debts, and be divided among them in proportion to their debts, notwithstanding the principal and interest on those debts might be in other ways and means aforesaid fully discharged; and then in consideration of the provision made by that deed all the creditors gave to Sir John Osborne leave and license to live any where without any let, molestation, or hindrance to be offered or done to Sir John Osborne on his person, or in his goods, chattels, or effects, by the creditors; and there was a provision made that if any one was to sue or molest him contrary to the license, his debt should be considered as released, and that

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Sir John Osborne might plead such release in bar to any action. Creditors to the amount of 36,697*l.* 6*s.* 11*d.* executed this deed, and signed the second schedule. The trustees effected insurances to the amount of 28,500*l.*, and in 1830 permitted some creditors who signed the second schedule to sign the first, and at the same time ceased to keep up one of the policies and apply the share of the rents which had been previously paid to the payment of the debts of the creditors who were so permitted to sign the first schedule. Sir John Osborne died on the 29th of August, 1848. One year after his death the trustees received the sum assured by the policies kept up, and 3729*l.* 9*s.* 8*d.* as a bonus or addition, amounting together, the two sums, to 27,229*l.* 9*s.* 11*d.* They had also in their hand 3000*l.* of rents unapplied. Before Sir John Osborne's death, O'Brien, as executor of a deceased creditor named in the second schedule, filed a bill against the trustees and Sir John Osborne, who was made a party. The latter put in his answer, raising no objection to the validity of the deed; but after his death, the bill being amended, and Lady Osborne, his widow and executrix, being made a party, she in her answer submitted to the court, whether, having regard to the proviso for the payment of the bonus to the creditors mentioned in the second schedule, the indenture was not usurious and utterly void, and whether the moneys in the hands of the trustees should not be paid to her.

The vice chancellor submitted the following queries to this court: first, whether the indenture of the first of July, 1823, is wholly, or to any and what extent, or as to any or what part, void for usury; secondly, whether the same indenture is void for usury as to the provisions for the creditors in the first schedule; thirdly, whether the same indenture is void for usury as to the provision for creditors in the second schedule; fourthly, whether the said indenture is void for usury so far as it provides for the debt of William Neale; fifthly, whether Lady Osborne could recover in any action at law from the trustees Lord Kenyon and Thomas Metcalfe the balance unapplied in their hands, and the surplus rents and profits received from the life estate of Sir John Osborne, or the amount received by them from the several insurance offices in respect of the policies of insurance, or any and what part thereof.

The case was now argued by

Peacock, (*Hannen* with him,) for the defendants. First, the deed of the 1st of July, 1823, was not void on the ground of usury. It is clear that there was no usury as regards the creditors of the first schedule, and the question is, whether the indenture is void as respects the creditors of the second schedule. This question, it may be observed, includes also the fourth point submitted by the vice chancellor to this court. The matter to be considered is, whether the chance that the creditors may by some contingency obtain more than their principal and the usual interest will avoid the deed of the 1st of July, 1823, under the stat. 12 Ann. sect. 2, c. 16. Now, assuming that this is a contract for a forbearance to sue Sir John Osborne for his life, then to render it usurious it must be a contract that the creditors shall

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receive more than their principal and interest at 5*l.* per cent. *Holland v. Pelham*, 1 Cr. & J. 575; s. c. 9 Law J. Rep. Exch. 139. Now, it is to be observed, that in this case the trustees had no power to pay a larger sum than would insure the 28,500*l.*; they were not at liberty to pay more to entitle themselves to a share in the profits of the office. They could not add the bonus to the policy. The result is, that they become partners and obtain the bonus, not as insurers, but as partners, and that transaction is not usurious. The next consideration is, whether the insurance office could be compelled to pay the bonus. A creditor has an interest in the life of his debtor, and cannot recover beyond the amount of his interest; he cannot recover more than his debt and the interest upon it. The insurance company are not by law bound to pay him more; then, suppose they choose to make him a present of a larger amount, which may be the case here, that transaction is not usurious. To make such a proceeding usurious, there must be a contract, by virtue of which a party is entitled by law to recover more than the amount of his principal and interest. *Godsall v. Boldero*, 9 East, 72. It would not be usurious if the stipulation had been, that, provided the company give the creditors commission beyond the amount of their principal and interest, it should be lawful for the creditors to keep it. Again, the effect of the deed was to discharge Sir John Osborne from the payment of the debt. *Ford v. Beech*, 11 Q. B. Rep. 852; s. c. 17 Law J. Rep. (N. S.) Q. B. 114. It is not a mere covenant not to sue. Roll. Abr. tit. "Extinguishment," L. 2. *Gibbons v. Vouillon*, 19 Law J. Rep. (N. S.) C. P. 74. Then, if the creditors were disabled from suing Sir John Osborne, the transaction is not usurious. If Sir John Osborne were sued during the time he was performing the covenants of the deed, there would be a release; but whilst he performs the covenants, the transaction amounts to a mere suspension of the debt. That being so, the debt is gone.

Then, the transaction does not amount to usury, as the parties look to the policy only, which might become forfeited by Sir John Osborne going abroad, or by other means. The creditor is merely indemnified; he does not gain beyond the amount of his debt. If the life estate had been sufficient to pay off the whole of the debt, the creditors would have no claim to the insurance. That disposes of the first four questions in this case. The fifth question is, whether Lady Osborne can recover from the trustees, and the defendants contend that she cannot. There is nothing but a trust, and the money is not recoverable.

[*Parke, B.* It is an appropriated trust, that is all.]

Again, Lady Osborne cannot recover from the trustees the money they obtain from the office. It is merely a question of trusteeship.

Willes, contra. It is contended on the other side, that this contract may be rendered valid according as there may or may not be enough to pay the creditors. But this is not the case. The transaction is void or not according as the deed is to be read the day after it is made. The risk of insolvency is not to be taken into consideration. With respect to the second point, the case of *Morse v. Wilson*,

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4 Term Rep. 353, is applicable. Then as to the third question, the creditors have a chance of obtaining something from the insurance office, and that is sufficient to make the contract usurious. *Jestons v. Brooke*, Cowp. 793. In the present case nothing more is given up than the security of the debtor.

[*Parke*, B., mentioned *Earl Chesterfield v. Janssen*, 1 Atk. 339.]

There the principal was in jeopardy, and, therefore, that decision is not applicable to the present. The case now before the court falls within the rule in Bac. Abr. tit. "Usury," D. Where money is lent for a term of years, it may in one sense be said to be in jeopardy; but the contingency that courts of law take into their consideration is the chance of the debt being lost altogether. But if the principal remains, the courts have never said that that is such a contingency as takes the case out of the statute of usury. *Morse v. Wilson* shows that a contract may be usurious, although the principal is put to hazard. Here the creditors do not give up the principal, but get the chance of a bonus. It is said that this is not a loan; but a bargain for forbearance is usurious. Bac. Abr. tit. "Usury," D. Again: this is a loan within the statute relating to usury. The stat. 37 Hen. 8, c. 3, s. 3, referred to by Burnet, J., in *Earl Chesterfield v. Janssen*, shows what constitutes usury. A debt forborne is in the nature of a loan. Again: the condition in the deed that if Sir J. Osborne be sued, he may plead the deed as a release, is a defeasance, and not a suspension of the debt.

[*Pollock*, C. B., referred to *Roberts v. Trenayne*, Cro. Jac. 507.]

Peacock, in reply. The fact of the creditors' obtaining more than their principal and interest, is the consideration for their releasing Sir J. Osborne. The arrangement for the payment of the debts is the consideration for their covenanting not to sue him. It is a purchase from them of a covenant not to sue. The transaction amounts not to a contract for forbearance, but to a giving up of a right. Besides, the forbearance was optional.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

POLLOCK, C. B. After stating the case as above set forth, his lordship proceeded: In this case we shall certify our opinion to the vice chancellor, answering all and each of these questions in the negative; but according to the practice which has of late obtained, we proceed to state publicly our reasons for these answers. We have had much doubt as to the proper answers to be returned to the third and fourth questions, and to so much of the first as relates to the creditors in the second schedule, the doubt arising from the creditors in the second schedule being apparently entitled under the deed to something beyond the principal and legal interest upon the whole amount of their debts, namely, to a proportionate share of the bonus or addition made to the principal sum in the policies men-

¹ *POLLOCK*, C. B., *PARKE* and *ALDERSON*, BB.

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tioned; but we are satisfied, after much consideration, that the indenture is not void as to those creditors.

We have never felt any difficulty as to the answer to be returned to the other questions. By the first indenture, dated the 9th of April, 1822, the entire control over the rents is given to the trustees, for the purpose of making such arrangements as they might think right with Sir John Osborne's creditors; and by the resolution which was carried into effect by the second indenture the creditors divided themselves into two classes, one who were willing to take their proportion of the rents in satisfaction *pro tanto*, first of the principal, then of the interest on their debts, and another who preferred the application of their shares to the effecting insurances on Sir John Osborne's life and waiting for the payment of their debts till his death; and both then covenanting to discharge Sir John Osborne for the whole of his life, and in effect, although not in words, to look alone to his personal and real estate after his death, if there should be any, for the payment of that unsatisfied portion of their debts, if any should be unsatisfied, for the debts are not discharged by the indenture, the remedy of the unpaid portion continuing after Sir John Osborne's demise; but any personal remedy against himself by an action at law being absolutely gone, the latter class are entitled to the bonus, if any, on the policies which are effected for their benefit; and the principal question is, whether the stipulation for this additional benefit beyond 5*l.* per cent. interest payable on the death of Sir John Osborne makes the bargain usurious.

We never have had any doubt that the transaction with respect to the creditors in the first schedule was perfectly legal. Their proportionate part of the rents is severed from the rest, and in no way affected by the bargain with the other creditors. As to those creditors, we are by no means satisfied that this agreement for the license to Sir John Osborne for life can be considered as a forbearing of the debt within the meaning of the stat. 2 Anne, c. 16, s. 2. In this case it is a relinquishment of the personal liability of the debtor altogether. It is not a mere forbearing, but it is a relinquishment of the liability of the debtor personally, altogether, forever, retaining only a remedy against his real or personal representatives, who are not liable in person. And the case may be likened to an agreement to keep up the liability of a surety and to release a particular estate from a judgment binding all the estates of the parties in consideration of a sum of money, which we do not think would be void on the ground of usury, if not entered into as a shift or contrivance to give color to it.

It is unnecessary for us, however, to give any decisive opinion upon this point, although we plainly intimate that is the inclination of our opinion at present, because we are satisfied that the proviso as to the creditors in the second schedule is valid on another ground. First, it is obvious, on looking at the whole of the transaction, that the division into two classes is an arrangement made between the creditors themselves, each having an option, at least before the deed was executed by him, to fix the class to which he would belong;

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and the trustees, in disposing of the rents, so far as was necessary for the payment of the debts, really acted on behalf of the creditors themselves. And the agreement as to the disposition of the shares of the rents belonging to them being a stipulated arrangement *inter se*, which the trustees were to carry into effect, the first class of creditors agreeing to be paid their share and divide it, those of the second class to employ it in what they considered a more beneficial way of securing their debts by effecting insurances, and authorizing their trustees to do that in a speculative mode by the risking it in insurance and giving them a share of the profits in the shape of a bonus; and Lord Kenyon and Metcalfe then, in their character of the trustees in the same deed, are in the same situation as if the creditors had named other persons to be their particular trustees for carrying this arrangement into effect. It was indifferent to Sir John Osborne under which class the creditors should place themselves, and indeed he had no power to object to any disposition of the rents which the trustees who, by the first indenture, had the uncontrolled management of the payment of the debts should think proper to order; so that looking at the transaction in this point of view there is no promise for forbearance beyond 5*l.* per cent. — no agreement with the party to whom the forbearance was made that more should be paid by him or by any one for the forbearance. The additional sum is nothing more than what may arise from the use of their own funds in the way in which they choose to use the funds, as they were entitled to do according to the provision of the deed. But it may be said, that although this arrangement might have been made and might have been perfectly valid if Sir John Osborne was not made a party, yet he is made a party, and there is a stipulation with him that a share of the rents belonging to the second class should be applied so as to give a possible benefit of more than 5*l.* per cent., and, therefore, there is a usurious bargain with him. It may be doubtful whether such is the effect of making Sir John Osborne a party to the second indenture, and stating that it was agreed between all parties to the indenture that the trusts therein mentioned should be executed. It is said that the covenant was, pursuant to the resolution of the creditors, a matter in which Sir John Osborne took no part, and he may be a party to this indenture, not as taking an interest in the application of the funds of the creditors of the second class for the purpose of insurance, but only to testify his approbation of the arrangement made by the trustees for the creditors, and because it was part of the bargain that he was to have a license for life as well as the surplus of the rents after effecting the object of the first deed; but if this is a covenant with him by the trustees to lay out the second share of the rents in effecting insurances, so that he or his executors might complain of the breach of covenant if the trustees applied them to the payment of debts in the second schedule simply, and thereby reduced his debt beyond the amount of the share of rent received, instead of that beyond the sum which ought to have been insured, in our opinion it makes no difference. It was in the option of the trustees to insure in an office which gives no share of the profit to the assured, or in

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one which does; and in the latter case there is a possible risk of being considered a partner. Assuming that in this part of the deed the trustees do covenant with Sir John Osborne to lay out the money in insurance, the covenant is qualified by the proviso, and the effect of so qualifying it is only this, that if the trustees should choose to do so in one of the offices which make the assured partners, all the share of the profit, which is a compensation for possible risk, shall belong to the creditors, and not be applied to the benefit of Sir John Osborne in reducing the debt. Sir John Osborne in effect says, "You might insure so that when I die my estate may have the full benefit of my estate being discharged to the amount of the insurance, and the surplus of the sum assured beyond. You may do so in any office in London or Westminster; but if you choose to do so in one in which you may possibly incur liability as partner, you may take all the bonus, which is, in fact, a compensation for any possible risk, for the use of the creditors, for whom you act." In this view of the case, there is no ground to say that the transaction, as to the creditors in the second schedule, is usurious, and we are all of opinion that it is not.

The answers, therefore, to the whole of the first and third and fourth questions, as well as to the second, will be in the negative. As to the fifth, as the transaction is altogether untainted by usury, no action at law would lie, at the suit of Lady Osborne, against the trustees, to recover either the balance unapplied or sums recovered from the insurance office; nor, indeed, if the transaction were usurious as to the creditors in the second schedule, would an action lie. The whole of the rents are vested in the trustees by the first indenture, and Sir John Osborne and his executors had nothing but an equity as to the surplus of the trust funds to be enforced in a court of equity. We are of opinion that no action at law would lie.

A certificate, in conformity with the above decision, was afterwards sent to the vice chancellor.

CHEESMAN v. EXCELL.¹

Easter Term, April 17, 1851.

Trover — Deposit of Goods — Execution — Right of true Owner to recover — Pledge.

Judgment having been obtained against the plaintiff in 1844, he executed a bill of sale of his plate to M. to defeat the execution. M. afterwards took an assignment of the judgment, and in 1848 issued an execution against the plaintiff and seized his goods, whereupon the latter, for the purpose of defeating the execution of M., deposited the plate with the defendant:—

Held, in an action of trover for the plate, that the defendant was entitled to set up the right of M. to it.

¹ 20 LAW J. REP. (N. S.) EXCH. 209.

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Seemle, that where property is pledged to which the pledgor has no title, and which he has no right to pledge, the pledgee is bound to return it to the true owner; his undertaking, in the absence of a special contract to the contrary, being that he will return it to the pledgor, provided it turns out not to be the property of another.

TROVER for a quantity of plate.

Pleas — Not guilty and not possessed.

At the trial, before Lord Campbell, C. J., at the last Kent Spring assizes, the facts were as follows: The plaintiff, in 1844, being indebted to one Oliver, whose administrators had commenced an action and obtained judgment against him on the 24th of December, 1844, executed a bill of sale of his property, including his plate, to W. B. May and J. Biggenden. Some evidence was given, on behalf of the defendant, of a debt being due from the plaintiff to May and Biggenden, but the object of the bill of sale apparently was to defeat Oliver's execution. In 1847, the administrators of Oliver having assigned their judgment debt to May and Biggenden, and the plaintiff being pressed by his other creditors, May and Biggenden, on the 8th of March, 1848, issued execution upon their judgment, and seized the plaintiff's goods. Whilst the sheriff was in possession of the goods under the execution, not having actually seized the plate, the plaintiff delivered it to the defendant, as the plaintiff contended, by way of security for a debt due from him to the defendant, which was afterwards repaid, but, according to the case of the defendant, for the purpose of defeating the execution of May and Biggenden. The plaintiff had remained in possession of the plate from 1844 to March, 1848. Lord Campbell, C. J., left three questions to the jury: first, whether the bill of sale by the plaintiff of the 24th of December, 1844, was for a valuable consideration and *bona fide*, although intended to defeat Oliver's execution. This question was answered in the affirmative. Secondly, whether the plate was, in 1848, pledged to the defendant for a debt, or given fraudulently to prevent the execution of May and Biggenden, and to be kept for that purpose. The jury found that the plate was handed to the defendant merely to prevent the execution. Thirdly, whether the execution of March, 1848, was for the benefit of May. The jury answered that it was. The learned judge then directed a verdict to be entered for the defendant on the second issue.

Shee, Serj., now moved for a new trial, on the ground of misdirection, and of the verdict being against the evidence. The evidence showed that the plate belonged to the plaintiff, for he was allowed to deal with it as his own from 1844 to March, 1848, and it was not seized by the sheriff under the execution. The defendant was not entitled to set up the *jus tertii*.

POLLOCK, C. B. There ought to be no rule in this case on the ground of the verdict being contrary to the evidence, for the chief justice reports to us that he is not dissatisfied with the finding of the jury. As to the second point, I assume that there was evidence in support of the finding of the jury upon points submitted to them, and that their finding was correct. It appears that the defendant

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refused to restore the plate, saying that he was liable to return it to May and Biggenden. My impression is, that if a man pledges to another property to which he has no title, and which he has no right to pledge, the real owner may interpose and get possession of the property. In the administration of the criminal law it is a matter of ordinary occurrence for a pawnbroker to deliver up to the true owner plate which has been stolen and pawned to him. If my servant pledge my plate to a pawnbroker, he cannot afterwards legally get it from the pawnbroker by threatening him with an action, but the latter may ascertain who is the true owner and deliver the plate to him. It is true a man may make a special contract to deliver up property to the pledgor under any circumstances, and may in that way render himself liable to an action for a breach of contract for not restoring a chattel. But such a position is not the natural consequence of the act of pledging property. A party with whom an article is pledged undertakes to return it to the pledgor, provided it turns out not to be the property of another. [His lordship here stated the facts.] The case of *Ogle v. Atkinson*, 5 Taunt. 759, which was tried before Mansfield, C. J., and afterwards came before the court of common pleas, is in point. That case decided that a warehouse-man receiving goods from a consignee who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them if they are the property of another. There Heath, J., says, "As to the preliminary point first taken, it is peculiar to the action of ejectment that he who is intrusted with the possession of land must deliver it back to his lessor, but that rule extends to no other action." Even in that case, the tenant may show that his landlord's title has ceased. The defendant in the present case was entitled to set up the *jus tertii*, and there was no reason why an inquiry into that matter should not take place. The learned chief justice was right in his view of this case.

PARKE, B. I also think this rule must be refused. As to the first point, of the verdict being against the evidence, that was a matter for the consideration of the jury, and the lord chief justice reports that he is satisfied with their decision. As to the second point, I think there was no misdirection. I do not dissent from the opinions expressed by the lord chief baron. On the contrary, I think that a party with whom property has been pledged may set up the *jus tertii*, unless he has made an absolute agreement to give up the property to the party pledging it. It is unnecessary to state here whether there be an implied understanding on the part of the pledgor that the property pledged belongs to him. Here it was properly left to the jury to say whether the plate was handed over by the plaintiff to the defendant to secure money advanced, or to get it out of the way and so defeat the execution, and the jury have found that it was parted with for the purpose of avoiding the execution. In that case, therefore, there was no undertaking on the part of the defendant to return the property to the plaintiff. The plaintiff has no property in the plate, and the defendant would be liable to the true owner, and is entitled to set up the present defence against the plaintiff's claim. As to May and

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Biggenden, they had a right of property in the plate, because although the transfer was made to them for the purpose of avoiding Oliver's execution, still the transaction was valid, except as against the plaintiff's creditors. The defendant, therefore, is entitled to the verdict, as the property came into his hands under such circumstances as did not compel him to deliver it to the plaintiff, but entitled him to set up the *jus tertii*.

MARTIN, B. If the jury are right as to the second point, the case is quite clear. The plate originally belonged to the plaintiff, but was afterwards transferred to May and Biggenden. The possession of the property was immaterial. It is possible that May and Biggenden may have given it back to the plaintiff, but that point was not raised at the trial. The plate must, therefore, be taken to belong to them, and that the possession of it was changed merely by the plaintiff for the purpose of avoiding the execution. The true owner of the property is entitled to demand possession of it, and it would be a good answer in an action by the plaintiff against the defendant for the latter to show that he had parted with it to the true owner. With respect to the contract of pledge, I do not concur in thinking that the only cases, where a party intrusted with the possession of property must deliver it back to the party from whom he received it, are cases of the delivery of land, because many cases might be put in connection with wharves and docks, where, if that rule were to hold good, serious consequences would ensue. It is unnecessary, however, to give any opinion upon this point.

Rule refused.

BLAND v. CROWLEY & another.¹

Easter Term, May 12, 1851.

Railway Company — Deed — Covenant for Compensation, Construction of.

The declaration stated that the defendants were provisional directors of a certain company and promoters of a bill in Parliament for making a railway from E. to P., and that by articles of agreement between them and the plaintiff it was witnessed, that in consideration of the covenants thereafter contained, the plaintiff covenanted that he would accede to the bill, and the defendants covenanted that, in the event of the bill passing into a law, the company should pay him for so much of his land as should be intersected by the railway at the rate of 120*l.* per acre, and secondly, that they should pay him 3000*l.* in full compensation for the general damage which the railway might do to the mansion, park, and estate, including the crossing of the road near the park entrance, the lowering the road, the obstruction of views, disturbance of privacy of the park, &c., the expense of temporary residence during the progress of the works, the depreciation as a residence, the additional expense in the cultivation of the farms by the alteration of the road, and all other damage to be done to the mansion and park. Averment, that the plaintiff did assent to the bill, and the same passed into a law; that the company entered on the plaintiff's lands and cut down trees, &c., and although seven acres were intersected and severed by the railway, and the park and mansion deteriorated, yet neither the company nor the defendants had paid

¹ 20 Law J. Rep. (N. S.) Exch. 218.

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the plaintiff 120*l.* per acre, nor the 3000*l.* Fourth plea, that the company did not enter on the plaintiff's land. Fifth, that the quantity of the plaintiff's land intersected by the railway was not required by the company for the purposes of the railway, nor was it severed from the remainder of the fields:—

Held, per Parke and Platt, BB., that the defendants were bound by their covenant to pay the plaintiff the sum of 3000*l.* immediately after the passing of the act, although the railway had not been constructed nor any damage done to the plaintiff's land; *dissentiente* Pollock, C. B., who held that the plaintiff was not entitled to the 3000*l.* until his land should have been taken or some damage done.

COVENANT. The declaration stated that the defendants were provisional directors of a certain company and promoters of a bill in Parliament for making a railway from Epsom to Portsmouth; that by sealed articles of agreement between them and the plaintiff, after reciting that the railway was proposed to be carried close to the park of the plaintiff, and through his land, and that he had until that time dissented thereto and opposed the bill, it was witnessed that, in consideration of the covenants thereafter contained, he, the plaintiff, covenanted that he would accede to the bill, and the defendants covenanted that, in the event of the bill passing into a law, the railway company should pay him for so much of his land as should be intersected by the said railway, at the rate of 120*l.* per acre; and secondly, that they should pay him 3000*l.* in full compensation for the general damage which the said line of railway should or might do to the said mansion, park, and estate, including therein the crossing of the road near the entrance of the park by a bridge, the lowering the said road, the obstruction of views, disturbance of the privacy and seclusion of the said park and mansion, the expense of temporary residence during the progress of the works of the said company, the depreciation in value as a residence, the additional expense in the cultivation of the farms by reason of the alteration in the road leading to Leatherhead and other towns in the neighborhood, and of all other damage to be done to the said mansion and park. It then stated a covenant by the plaintiff for conveyance of the land on tender to him of 120*l.* per acre and 3000*l.* That the plaintiff did assent to the bill in Parliament, and the same passed into a law; that the company entered on the said lands of the plaintiff, cut down trees and dug up the soil, and although seven acres of the plaintiff's land were intersected and severed by the railway, and although the defendants were requested to pay the plaintiff, and although the park, mansion, &c., were deteriorated, yet neither the company nor the defendants had paid the plaintiff at the rate of 120*l.* per acre, nor the sum of 3000*l.*

Fourth plea — That the company did not enter on the plaintiff's land.

Fifth plea — That the quantity of the plaintiff's land intersected by the railway was not required by the company for the purposes of the railway, nor was it severed from the remainder of the fields.

Special demurrers to the fourth and fifth pleas. The principal causes of demurrer to the fourth plea were, that it was unimportant whether the company entered on the lands or not; that if the lands were required for the railway or were severed, that would entitle the

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plaintiff to be paid; and that, at all events, the plea contained no answer to the second breach.

To the fifth plea the principal cause of demurrer was, that that plea afforded no answer to the second breach; and that the plea was immaterial, the company having entered upon and marked out the part of the land the price of which the plaintiff sought to recover.

Peacock, (*Dowdeswell* with him,) in support of the demurrer. The fourth plea is bad, and affords no answer to the non-payment of the stipulated sum of 3000*l*. The meaning of the covenant is, that if the plaintiff does not oppose the company's bill, then upon its passing into a law the company will pay him 3000*l*. for prospective and possible damage. The agreement then stipulates that certain acts are to be included in this damage. This sum is to be paid before the line is made, and the sustaining of damage is not to be considered as a condition precedent to the liability of the defendants to pay the 3000*l*. The plaintiff's estate might be damaged, although the land might not be taken. As soon as the bill passed into a law, the plaintiff's land became servient to the rights of the defendants under the act of Parliament. If the doing of actual damage is to be considered a condition precedent, then the doing of every amount of damage specified in the agreement is also to be considered as a condition precedent. But, can it be said, that if the company did every other description of damage, except that of crossing the road by a bridge, they are not to pay the 3000*l*? The same argument might also be urged as to the stipulation respecting temporary residence, or any of the other specified matters. As soon as the plaintiff is entitled to recover part of the 3000*l*., he is entitled to recover the whole.

[*Pollock*, C. B. This covenant follows, and is made with reference to the general law of the land respecting matters of this kind. It is stipulated that on tender to the plaintiff by the company of 120*l*. per acre, and also on tender to him of 3000*l*., the plaintiff shall convey to and deliver to the company actual possession of the lands. The company, therefore, are not entitled to enter upon the land until they have performed this condition. They treat the agreement as standing in the place of assessment by a jury. The plaintiff says, "When you, the defendants, tender me the 3000*l*., I will let you have my land."]

If the sustaining of any damage is to be a condition precedent to the plaintiff's right to recover the 3000*l*., it follows that the sustaining of the whole damage is a condition precedent also, a conclusion which leads to an absurdity, for it would be easy for the defendants to commit every specified item of damage except one, and then contend that, as they had not done the whole damage, they were not bound to pay any portion of the 3000*l*. The fifth plea is also bad, for it is not a condition precedent that the intersected land should be required for the purposes of the railway. The plea does not state that none of the acts of damage mentioned in the agreement have been done. The plaintiff may have taken a temporary residence. The defendants might as well have pleaded that no injury had been

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done to the extent of 3000*l.* as to have put the present plea on the record.

Bramwell, (*Burchell* with him.) The clew to this agreement is to consider it as a substitute for the mode given by law of assessing damages by a jury. The agreement was framed with reference to the law contained in the Consolidation Acts. In this point of view the defendants may naturally have stipulated for the amount of damages to be paid by them. There is no statement of the time when the 3000*l.* are to be paid, and the fair inference is that that amount, together with the sum of 120*l.* per acre, were to be paid at the same time. The money is not to be paid as soon as the bill passes into a law, but only when the land is required and the quantity known, or when the line of railway is made. *The Queen v. The Eastern Counties Railway Company*, 2 Q. B. Rep. 347; s. c. 11 Law J. Rep. (N. S.) Q. B. 66, is in point. He also cited stats. 8 Vict. c. 20, s. 6, and 8 Vict. c. 18.

Peacock, in reply. The effect of the defendants' stipulation is that they will pay the sum of 3000*l.* within a reasonable time.

Cur. adv. vult.

There being a difference of opinion on the bench, the learned judges now proceeded to deliver their judgments *seriatim*.

PLATT, B., after stating the pleadings, said: The question raised by the pleadings is, whether, according to the true construction of the covenant of the defendants, the payment of the sum of 3000*l.* depended upon this company's entering upon the plaintiff's land, or their requiring for the purposes of the railway the whole or part of the plaintiff's land intersected by the proposed line of railway. The solution of this question depends upon the intention of the contracting parties to be collected from the recitals and stipulations in the deed. By the recital, the sole object of the company seems to have been to buy off the plaintiff's opposition, and the object of the plaintiff to have been to secure that price for which he would abandon it: such being the respective objects, the plaintiff, in consideration of the covenant and agreement of the contracting directors, covenants to assent to the bill, provided it should pass into a law within a particular period, and the defendants, in consideration of the assent given to the bill by the plaintiff, covenanted with the plaintiff, that in the event of the bill passing into a law in the present or ensuing session of Parliament, the company incorporated thereby should fulfil the following conditions and agreements: First, that the company should pay for such of his land intersected by the said line of railway as might be required for the purposes thereof, at a certain rate per acre; and, secondly, that they should pay to the said plaintiff the sum of 3000*l.* in full compensation for the general damage which the said railway could or might do to the said mansion, park, and estate called Randalls, including interference with the road near the park,

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and other particular kinds of damage done to the estate. The particular description of damage agreed to be included in the subject of compensation does not appear to me to shed any light upon the construction of the covenant. It seems to have been added in order to protect the company from any further claim for compensation. It should be observed, although the damage for which compensation was to be made might include the damage particularly specified, it does not follow that it excludes all other damage which might result on the company's bill passing into a law, such as depreciation of value of the plaintiff's estate resulting from a portion of it being, during the period so prescribed for executing the works of the company, subject to the exercise of that power over it. Without, therefore, embarrassing the question with unnecessary matter, what is the engagement which the covenant read down to the word "Randall" assumed? The money is to be paid in the event of the bill passing into a law; what other event was to happen before the liability to pay was to attach? No other event is mentioned in the covenant. The liability could not have been postponed until after the company's entry upon the land, which is one of the pleas. The plaintiff was not bound to give them possession until they had tendered not only the price of the land, but the 3000*l.* also, the stipulation of the deed. The deed does not contain any clause tending to show that the liability to pay the compensation was to be dependent upon the company's requiring the land for the purposes of the railway. The contracting directors covenanted that, in the event of the act passing, the incorporated company should pay a sum certain as a compensation for general damage, that is, by them to be done to the plaintiff's estate. The sum was ascertained, and why should not the parties pay? The agreement is, that it should be paid forthwith. The plaintiff might have disturbed the power of the projectors to execute their project, and so have anticipated its abandonment, and any damage, even in that case, he would be likely to sustain. The argument to be deduced from the Lands Clauses Consolidation Act cannot, as it seems to me, alter the distinct terms agreed upon by the parties. If we were to permit such an alteration, we should make for the contracting parties a bargain of which they themselves never dreamed. Upon the whole, it seems to me that the defendants, in consideration of the assent alone given to this act of Parliament, covenant to pay for the general damage a sum certain by way of compensation, and that in the same event they should pay also a stipulated sum for the acreage of such land as may be taken of the property, which consists, antithetically to the general damage, of the particular damage which the owner of the estate might have suffered. It seems, therefore, to me that these two pleas are insufficient as a bar to the action, and that the plaintiff is entitled to judgment.

PARKE, B. It is unnecessary for me to state the pleadings in this case, as my brother Platt has brought them distinctly before the court. The question in this case is as to the true construction of the deed, which was prepared apparently in the confidence that if the bill for

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making the Direct Portsmouth Railway passed into a law, the promoters would certainly carry the undertaking into effect. If the parties had contemplated the possibility after that bill passed that the railway would have been abandoned, it is probable a distinct provision would have been made for that event, leaving no doubt whatever as to the intention of the contracting parties. As the deed is framed some doubt may arise as to the intention, and also as to what the parties would have stipulated if the present state of facts had been presented to them. All we can do is to ascertain the meaning of the words used, and in construing the deed we must adopt the established rule of construction, to read the words in their ordinary grammatical sense, and to give them effect, and to make such a construction as does not lead to an absurdity or inconvenience, or would be plainly repugnant to the intention of the parties, to be collected from other parts of the deed. I think the parties have bound themselves by their covenant that the company is to pay the 3000*l.* for which the action is brought immediately after the passing of the act, although the railroad should not be constructed nor any damage done to the plaintiff. They have covenanted in the event of the bill passing into a law, in the present or ensuing session of Parliament, that the company shall perform two covenants: the first, that the company shall pay at the rate of 120*l.* per acre for all land that might be required, and for damage by severance. If no land should be required, the stipulated price would not be payable; as none was required, the defendants could not be called upon to pay any part of the price.

The second covenant is, that they are to pay 3000*l.* to the plaintiff, in full compensation for the general damage which the line of railway should or might do to the plaintiff's mansion-house, including therein the crossing of the road near the entrance of the park by a bridge, lowering of that road and obstruction of the view, disturbing the privacy, expense of temporary residence, depreciation in the value of the residence, and additional expense in the cultivation of the farms, by reason of the alteration of the road leading to Leatherhead and other towns in the neighborhood, and of all other damage to be done to the mansion-house and park. This latter covenant is a distinct and separate one. It is not made to be contingent upon the company requiring the land. Then comes a covenant that the plaintiff should convey upon the tender of 120*l.* per acre and 3000*l.* There is no time expressly stipulated for the payment of the 3000*l.*, and the plaintiff is not bound to convey at any time, without tender of the price of the land and 3000*l.*, thus obtaining a lien on the land for both; but the defendants are not bound to pay the 3000*l.* at any precise stipulated time. All that is covenanted is, that in the event of the bill passing, the sum should be paid as a compensation for special damage that shall or may be done, and all other damages to be done. It is not said that when the bill is passed the money should be paid, but only in the event of its passing it should be paid. This difference of expression was pointed out by the court in the course of the argument, and it was suggested that the covenant was to be read in the

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same way, in the event that has happened of the passing of the bill, as if introduced into a deed prepared after the bill had passed; and if so, it could not be construed to be a covenant that it was to be paid, unless the damages of the nature supposed had actually occurred. Even so read, it would have been questionable whether that would have been the true meaning of the covenant; a difficulty would have occurred as to the time of payment. Ought it to be paid when any damage, however small, occurred? If so, greatly more than its amount would be payable if the whole sum would become due, and there is no provision for the payment of a proportionate part. On the other hand, if it would be payable only when all the possible damage had been sustained, the payment might be indefinitely postponed, and possibly never arrive. But in truth, this mode of considering the question if the deed had been executed after the act is certainly erroneous. There is a great difference between such a covenant before the bill passes and after the bill becomes a law. After the bill becomes a law, there could be no reason for paying money to the plaintiff, except as compensation for actual damage. Before the bill became a law, the plaintiff might oppose it possibly with success, and the covenant not to oppose furnishes a good reason for making the covenant to pay absolute. It is the price to be given to the plaintiff for agreeing to give the company, through the medium of the act, a power for three years to affect his estate, by exercising the powers of the act; and the form of the deed in this case shows clearly that the plaintiff's consent was the consideration for which the defendant covenanted it should be paid; indeed, it is expressly so stated. I cannot, therefore, consider this covenant of the defendants to be on the same footing as if introduced in the same words in a deed executed after the passing of the act; as it is a condition precedent to the covenant having complete effect, that the money is to be paid at some time, and as no precise time is fixed, it is payable immediately. It is not stated that it is to be paid as soon as any damage shall be done, or after all shall be done; and the inconvenience above pointed out of the other construction forms a good reason for not adopting it. Neither can we say that payment ought to be at the period when, according to the provisions of the act, the time for assessing the damages would arise, for that would be to alter the language, and to introduce new terms into it; and indeed all subjects specially mentioned could not be the subject of compensation to the plaintiff, if the covenant had not been introduced, the rule upon that subject being, as lately laid down by the Court of Queen's Bench, I think very rightly, that the test whether lands are injuriously affected by the construction of a railway is, whether, if they are deteriorated in value by the act done by an individual without the authority of the act, the land owner might obtain compensation. *Glover v. The North Staffordshire Railroad Company*.¹

The enumeration of the above-mentioned particulars seems to have been made to give a reason for the bargain for so large a sum, and indeed the damages enumerated do form the sole objection on the

¹ Not yet reported.

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part of a resident gentleman to the proximity of a railway, they not entitling him to compensation. It is to be observed, also, that the mere passing of the act would be practically a damage to the plaintiff, because it would render his place less salable by reason of the power of the company to make the railroad during the period they had the power of making it by the act, although the railroad should not be actually made. Without altering any of the words of the deed, and awarding to them their true ordinary meaning, I consider this the reasonable construction of the covenant, that the 3000*l.* is really the price of buying off the plaintiff's opposition, and he having consented to the bill passing, it must be paid, and when paid the plaintiff is not to insist afterwards upon any compensation whatever for any kind of damage. In this view, it is immaterial whether the road be constructed or attempted to be constructed or not, the only condition precedent being that of the passing of the act of Parliament; that being averred to have taken place, the plaintiff is entitled to recover, and, therefore, there must be judgment in my opinion for the plaintiff.

POLLOCK, C. B. The question in this case is, What is the true construction of the contract which the parties have entered into? Two constructions are presented to our attention. Upon the part of the one, it is contended that the agreement means that in consideration of the assent of the plaintiff to the passing of the bill, the defendants agree that in the event of the bill passing into a law this company would fulfil certain conditions, one of which was to pay to the plaintiff the sum of 3000*l.* in full compensation for general damage which the railway shall or may do to the mansion, park, and estate belonging to the plaintiff, including certain kinds of specified damage and injury, none of which, it is to be observed, not one single individual source of damage which is there enumerated, being of that description, except that which would arise from the construction of the railway. Some of the damage which has been alluded to by my brother Parke, in his judgment just delivered, such as that the estate could not be conveniently sold in the mean time from the liability to be taken or not taken during the period of three years, no such uncertainty in respect of the enjoyment of the estate, or the possibility whether the railway would or would not be constructed, no damage of that sort is mentioned in the agreement, except that description of damage which could alone arise from the actual making of the railway. And the plaintiff contends that the only condition precedent to his recovering the money is the passing of the act, and the consideration he gave was his assent to the bill; and he contends that as soon as the bill passed his title to the 3000*l.* accrued. Upon the other hand, the defendants contend that the agreement was in effect to settle the amount of damage between the claimant and the company, when any damage should be done, and if the company should not prosecute the scheme at all, they were not bound to pay the sum of 3000*l.* In considering this agreement I think we are entitled — indeed, I may say, I think we are bound — to consider not only the actual words of the contract itself, but all the circumstances

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of the transaction as far as they appear, the state of the law, and the known enactments of public statutes which have reference to the subject matter. Now, the public act of the 8 & 9 Vict. c. 18, commonly called "The Lands Clauses Consolidation Act," makes provisions for compensating owners whose lands may be taken for undertakings of a public nature; and I may here observe the very expression "may be," that I have just used, does not mean "may or may not be," not "may be possibly or contingently taken," but "may be actually taken;" and it divides the compensation into two parts, namely, what shall be paid for the value of the land to be purchased, and the sum of money to be paid as compensation for the damage done to other land belonging to the same owner; and as these clauses form part of the general law of the land, not merely presumptively known to all persons, but probably referred to and studied by those who prepared this agreement, I think we are entitled to look at these clauses just as if they had been embodied in the agreement itself; and it appears to me, so reading the agreement and so looking at the public law of the land, that the agreement between those parties was made expressly with reference to these clauses.

Now, I find by the terms of the agreement that the company are to perform the following stipulations and conditions, which are two, and two only: first, they are to pay for so much of the land as may be required or may be severed from the remainder, and they are to pay for it at the rate of 120*l.* an acre, and so in proportion; and as the company are to purchase at that rate, not only all the land that is required, but all the land that is severed from the remainder, the price of the land naturally and necessarily includes the price of the severance. If you buy all that is severed, there can be no damage remaining to be paid for by the act of severance. The second stipulation, and under which the question now falls, is to pay 3000*l.* in full compensation for the general damage which the line of railway shall or may do to the mansion and to the other lands of Mr. Bland which are not taken and which are not severed; and then there is a covenant by the plaintiff that upon the tender of these two sums, namely, the value of the land at 120*l.* an acre, and the sum of 3000*l.* before mentioned, he, the plaintiff, would convey the land and deliver possession to them. Now, I do not say that the order in which these stipulations are placed makes the one a condition precedent to the other; but in construing the words the parties use, it may not be unimportant to consider that they have made two stipulations: the first is, that the land shall be paid for; the second, that damage shall be paid for. The present contention on the part of the plaintiff is, that the first stipulation is of no importance whatever, and has no precedence whatever with respect to the second, but that the company was bound at once, as soon as the act passed, to perform the second portion of the agreement, and without any reference to the first at all. Inasmuch, however, as these two conditions are always in the agreement mentioned together, I infer from this, and from the manner in which they are mentioned, that the agreement had reference to the question which upon the passing of the act should arise between the

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plaintiff and the company, and that it merely meant to provide that, instead of resorting to arbitrators or a jury in the event of the act passing, the claim of the plaintiff should at once be considered to be settled by the agreement, probably upon very liberal terms, the land at so much per acre, and the general damage at a gross sum, but that it was not intended to accelerate the payment of either sum, still less to make the latter payment of 3000*l.*, payable *instantly*, wholly irrespective of whether any land should be taken or any damage done. It appears to me that if this agreement had been entered into after the passing of the act, no doubt would have arisen as to its construction; and if that be so, I do not see why it may not be construed in the same way, although the agreement was made before the passing of the act. It would then be that, on the one hand, the owner of the land consented to the passing of the act; there would be no mischief to him whatever if the act did not pass at all; his consent to the act amounted to nothing unless the act did pass; then, if the act did pass, the agreement would arise that he should be paid for his land and compensated for the damage in a manner stipulated by the agreement. And I understand the plaintiff to say this: "If I assent to the passing of the bill, or do not oppose it, you must agree to the stipulation that I shall stand upon a certain favorable footing in respect of compensation, it being distinctly understood beforehand, so that I may have no extra costs to pay, and no expenses to incur, and no anxiety or uncertainty to sustain." The expression, "shall or may," used with reference to damage to the mansion and other lands of the plaintiff, was urged upon us by the plaintiff's counsel, as showing that the sum of 3000*l.* was to be paid whether any damage was done or not. But his argument certainly produced no effect upon my mind, for the expression "general damage which the line of railway shall or may do the said mansion," &c., in my judgment, and with reference to the agreement especially referring to the agreement, the subject matter, and to the statute which regulates the rights of the parties, the expression *shall or may* is grammatically to be read "shall or may actually," and if the word *actually* was in the deed, — and I take it it ought to be read as if the word *actually* was there, — if the word *actually* was in the deed, I think it is perfectly certain that the plaintiff could not claim the 3000*l.* until some actual damage should be done; and I may observe here, that, in the 18th section of the act, "damage that may be sustained" is the expression that is to be found. That is an expression which it is impossible to construe in any other way than as damage (not possible damage) that actually may be sustained. I think, therefore, we are not only doing no violence to the language, but it seems to me the very language of the agreement with reference to the language of the act uses the expression, "shall or may be done," as meaning "shall or may *actually* be done."

Considering, therefore, all the circumstances which belong to the agreement and to the language used, I do not find myself fettered by any such grammatical construction opposed to the view I have taken as compels me to decide in a manner which I must say I think is not

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only contrary to the intention of the parties, but exceedingly contrary to the justice of the case and the general policy which should be observed in cases of a like nature. I must say, however, I entertain no doubt whatever that the construction I have put upon the contract is that which the parties intended; and I think it is by far the most reasonable construction, and for that reason I adopt it. The whole scope of the agreement appears to me much more to resemble an arrangement to get at the value of the compensation, if by the passing of the act that question should arise between the parties, than to provide for the payment of 3000*l.*; at all events, if the bill should pass, without reference to whether or not injury should be incurred, and as the injuries for which compensation is provided by the agreement are all of them such injuries as cannot arise except from the actual construction of the railway, it does not include any other injury, and certainly does not include the injury which my brother Parke has just referred to, viz., that the land would be tied up for a certain period with a prospective possibility of mischief, which might or might not be done. As no such injury as that is alluded to, it seems to me to import, from the very language used by the parties, that they did not intend that compensation should be made except in the event of the railway being actually made. I think, therefore, that our judgment ought to be for the defendants; but as my learned brothers are of a different opinion, the judgment of the court will be for the plaintiff.

Judgment for the plaintiff.

TOZER v. MASHFORD.¹

Easter Term, April 28, 1851.

Slander — Charge of Felony — Misdirection.

A declaration in slander, after stating as inducement that the defendant intended to impute felony to the plaintiff, set out the slanderous words as follows: "I (the defendant) have a suspicion that you (the plaintiff) and B. have robbed my house, (meaning thereby that the plaintiff had feloniously stolen certain goods of the defendant,) and therefore I take you into custody:"—

Held, that the judge rightly directed the jury in stating the question to be, whether the defendant meant to impute an absolute charge of felony, or only a suspicion of felony; and that if the jury believed the latter, the verdict ought to be for the defendant.

SLANDER. The declaration, after stating by way of inducement that the defendant used the words, "I have a suspicion that you robbed my house," for the purpose of expressing, and that the words were understood as expressing, that the plaintiff had feloniously stolen certain goods of the defendant's, set out the slanderous words as follows: "I (meaning the defendant) have a suspicion that you (meaning the plaintiff) and Bone have robbed my house, (meaning thereby that the plaintiff had feloniously stolen and carried away certain goods and chattels of the defendant's,) and therefore I take you into custody."

¹ 20 Law J. Rep. (N. S.) Exch. 224.

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At the trial, before Pollock, C. B., at the last Devonshire Spring assizes, the lord chief baron told the jury that the question was, whether the defendant meant to impute to the plaintiff an absolute charge of felony, and that if the jury thought that suspicion only of felony was imputed, the verdict ought to be for the defendant. The jury found a verdict for the defendant.

Collier now moved for a new trial on the ground of misdirection. The only question was, whether the words were intended to impute to the plaintiff that he had been guilty of entering and stealing in the defendant's house. The direction ought to have been that the plaintiff was entitled to the verdict if the words meant to impute a charge of felony by stealing in the house. The words impute a positive, and not an oblique or indirect accusation. In *Curtis v. Curtis*, 10 Bing. 477; s. c. 3 Law J. Rep. (N. S.) C. P. 158, the words "you have committed an act for which I can transport you" were held actionable, and Tindal, C. J., says, "We must understand these words in their ordinary sense. I cannot see how any one, who had heard that the defendant was able to transport the plaintiff, could form any other supposition than that the plaintiff had been guilty of a crime."

[*Parke*, B. You have taken upon yourself to prove the actual commission of the offence, not a suspicion merely.]

In Com. Dig. "Action upon the case for defamation," (E.) it is said, "And if words are slanderous, it is not material though they are spoken indirectly or obliquely; as, I will make thee an example for a perjured knave." So if they were said by way of conjecture; as, "I think, in my conscience, if he might have his will he would kill the king." Ibid. E. 3.

[*Parke*, B. An action will not lie for a mere suspicion of felony; but it will lie if a direct charge of felony is imputed. You say by your innuendo that the defendant intended to make a direct charge of felony, and on that point the jury have found against you.]

He cited and referred to Bac. Abr. tit. "Slander," G. *Snell v. Webbing*, 2 Lev. 150. *Davis v. Noak*, 1 Stark. 377. *Stich v. Wisedome*, Cro. Eliz. 348.

POLLOCK, C. B. In this case there will be no rule. No doubt it is easy to cite many cases of slander decided at the period embraced by the reports of Cro. Jac. and Cro. Car., which give a kind of color to this application. That was a period in which actions of slander had greatly multiplied, and it had become necessary to stop them; and without doubt some of those decisions would not be supported at the present day. But we do not cast any doubt on the bead roll of cases that have been cited from Bacon's and Comyns's Abridgment; for the declaration alleges that the defendant made an absolute charge of felony, whereas the words used impute a suspicion of felony only, and the jury have so found.

PARKE, PLATT, and MARTIN, BB., concurred.

Rule refused.

Ridgway v. Stafford.

RIDGWAY v. STAFFORD.¹

Easter Term, May 3, 1851.

Landlord and Tenant — Distress — Covenant to consume Hay on Premises.

A landlord who has distrained his tenant's hay made on the premises, and has sold it subject to a condition that it shall be consumed by the purchaser on the premises, by reason whereof it produces less than the usual price, is liable to the tenant in an action for not selling for the best price, notwithstanding that the latter was under covenant to consume such hay on the premises.

[*Abbey v. Petch*, 8 M. & W. 419, disapproved. — Ed.]

CASE for an illegal and excessive distress. The fifth count charged the defendant with not selling the plaintiff's chattels and crops for the best price.

Plea — Not guilty.

At the trial, before Talfourd, J., at the last Shropshire Lent assizes, it appeared that the plaintiff was tenant to the defendant under a lease, by the covenants of which he was bound to consume on the premises all the hay made thereon. The defendant having distrained the plaintiff's hay for rent, sold it, subject to a condition that it should be consumed on the premises, in consequence whereof the hay produced a lower price than if it had been sold in the ordinary way. The jury found a verdict for the plaintiff, damages 166*l.* 15*s.*, leave being given to the defendant to move to reduce the verdict to 26*l.* 15*s.*, if the court should be of opinion that the defendant was justified under the circumstances in selling the hay in the manner above stated.

Whateley now moved accordingly, (April 23.) The landlord was at liberty to sell the hay to be consumed on the premises pursuant to the covenants in the lease.

[*Parke*, B. Undoubtedly; the point was so decided in *Abbey v. Petch*, 8 Mee. & W. 419; s. c. 10 Law J. Rep. (N. S.) Exch. 455, in this court; but prior to that case, the contrary had been held in the same court, in *Jones v. Hamp*, which unfortunately was not reported; this appears from the case of *Frusher v. Lee*, 10 Ibid. 709; s. c. 12 Law J. Rep. (N. S.) Exch. 321.

The tenant has no right to complain that the covenants of his lease are observed in the sale of the hay. He ought not to be in a better condition than if he had paid his rent.

[*Martin*, B. A covenant cannot run with a chattel.]

The case of *Abbey v. Petch* has not been overruled. The hay is to be considered part of the land; it savors of the realty. The point arose in *Roden v. Eyton*, 18 Law J. Rep. (N. S.) C. P. 1. By the 56 Geo. 3, c. 50, s. 1, a sheriff is not at liberty to carry off the

¹ 20 Law J. Rep. (N. S.) Exch. 226.

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premises any produce which by the covenants of the lease is to be consumed on the premises. He referred to *Piggott v. Birtles*, 1 Mee. & W. 441; s. c. 5 Law J. Rep. (N. S.) Exch. 193.

Cur. adv. vult.

The judgment of the court¹ was now given by

POLLOCK, C. B. In this case we are of opinion that there ought to be no rule. The question raised on the motion made for a new trial was this, whether, when crops are taken as a distress upon the farm of a person who is bound by the covenants in his lease to spend such crops upon his farm, the crops ought to be sold with reference to that covenant, and whether if they are so sold, and on that amount fetch, as they naturally would, a much lower price, the landlord so seizing and selling is not liable to an action for not selling for the best price. We think that in this case there ought to be no rule, being of opinion that the decisions upon the subject at least make the proposition very plain. It is perfectly true that, in the case of *Abbey v. Fetch*, there was a contrary proposition entertained and decided; but prior to that there had been a different decision by my brother Patteson, confirmed also by this court in the case of *Jones v. Hamp*, referred to in *Roden v. Eyton*, and in this court in *Frusher v. Lee*. In this latter case, where the question came before this court, the trial having taken place, before my brother Alderson, at Norwich, my brother Parke mentioned that there were conflicting authorities; that is, the case of *Jones v. Hamp*, which had not been reported, but which is now to be found alluded to in *Roden v. Eyton*, where it was held, that the landlord has no right to annex such a condition to a sale. My brother Alderson, in the case of *Frusher v. Lee*, says, "I certainly was much impressed with Mr. Kelly's argument at the trial, against the decision in *Abbey v. Fetch*." On the whole, therefore, we consider it to be clearly decided that the sale of such produce, if it take place at all, ought to be irrespective of any covenant to spend it upon the premises. If the question is to be raised hereafter, it must be by bill of exceptions. A covenant to expend the produce upon the land is a covenant that cannot run with a chattel; and it is quite plain that the tenant himself would have the power to sell, and sell without such a condition, and he would be merely liable to his landlord for a breach of covenant; and if he might clearly send the goods to market and sell them, the person who seizes the property must sell in the same way, and sell for the best price.

Rule refused.

¹ POLLOCK, C. B., PARKE, PLATT, and MARTIN, BB.

The Waterford, Wexford, &c., Railway Company v. Dalbiac.

THE WATERFORD, WEXFORD, WICKLOW, AND DUBLIN RAILWAY
COMPANY v. DALBIAC.¹

Easter Term, May 2, 1851.

Railway Act — Condition precedent — Power to make Calls — Power to take Lands.

The 22d section of the Waterford, Wexford, &c., Railway Act enacts that when 1,500,000*l.* shall have been subscribed, it shall be lawful for the company to put in force all the powers of the act and of the acts therein recited, as regards that portion of the said railway situate, &c.:—

Held, that the raising of this sum was not a condition precedent to the power of the company to make calls, but only to their exercising the compulsory powers of taking lands, &c.

DEBT for calls against the defendant as a shareholder of the Waterford, Wexford, Wicklow, and Dublin Railway Company.

Plea — That by an act of Parliament for making a railway to be called the Waterford, Wexford, Wicklow, and Dublin Railway Company, the plaintiffs were empowered to make calls as therein specified, and the capital was required to be 2,000,000*l.*, and that by another act passed in the 11 Vict. it was enacted, that it *should be lawful* for the plaintiffs to put in force all the powers of the first-mentioned act and of the acts therein recited, (the Companies Clauses Act, the Lands Clauses Act, &c.,) as regarded that portion of the said railway which is situate between the Dublin and Kingstown Railway and Wexford, as soon as the sum of 1,500,000*l.* had been subscribed. Averment, that that sum had not been *bona fide* subscribed when the said calls were made.

General demurrer, on the ground that it was not a condition precedent to the right of the company to make the calls, that the sum of 1,500,000*l.* should have been subscribed.

Peacock, in support of the demurrer. The plea is bad. The question turns on the meaning of the 22d section of the company's act, 10 & 11 Vict. c. 61, which enacts as follows: "That when and so soon as the sum of 1,500,000*l.* shall have been subscribed and a certificate thereof obtained in manner required by the said Lands Clauses Consolidation Act, with reference to the subscription of the whole of the capital of the company, it shall be lawful for the said company to put in force all the powers of the said act authorizing the construction of the said railway, and of the acts therein recited as regards that portion of the said railway which is situate between the said Dublin and Kingstown Railway and the said town of Wexford." That section does not prevent the company from making calls, even although the whole sum of 1,500,000*l.* may not have been paid up. The only effect of non-payment is to prevent the company from exercising the compulsory power contained in the Lands Clauses Act,

¹ 20 Law J. Rep. (N. S.) Exch. 227.

The Waterford, Wexford, &c., Railway Company v. Dalbiac.

8 & 9 Vict. c. 18, s. 16, respecting the taking of land. [He was then stopped by the court.]

Grant, in support of the plea. The company are not entitled by the 22d section to put in force the powers of their act until the sum of 1,500,000*l.* has been subscribed.

[*Martin*, B. The enacting words of that section are permissive only.]

The 22d section of the act would be inoperative if the construction contended for by the other side were adopted. The 22d section relates to all the powers given by the act of Parliament and of the acts therein recited, which includes the Companies Clauses Act.

[*Pollock*, C. B. The meaning of the section is not that, until the company obtain 1,500,000*l.*, they shall not put in force any of the powers conferred by the act of Parliament. That section relates to the power of taking land and constructing the railway.]

This point arose in *The Waterford, Wexford, Wicklow, and Dublin Railway Company v. Logan*, 19 Law J. Rep. (N. S.) Q. B. 259.

[*Peacock*. This plea has been decided to be bad on special demurrer.]

Peacock was not called on to reply.

POLLOCK, C. B. The case mentioned merely decided that the plea might be allowed to be pleaded. The clause in question was framed for the benefit of the company; it did not restrict them to 2,000,000*l.*, but to 1,500,000*l.* only. It does not prevent them from making calls, although the whole amount may not be paid up. The plea is consequently bad, and our judgment must be for the plaintiffs.

PARKE, B. The effect of the 22d section is merely to restrain the company from exercising their compulsory powers until they have raised the 1,500,000*l.*

PLATT and *MARTIN*, BB., concurred.

Judgment for the plaintiffs.

 Fry v. Whittle.

FRY v. WHITTLE.¹

Easter Term, May 13, 1851.

County Court Act, 9 & 10 Vict. c. 95, s. 128 — Suggestion to deprive Plaintiff of Costs — Averment of Residence within twenty Miles.

An affidavit for a suggestion to deprive a plaintiff of costs under the County Courts Act stated as follows: "That the plaintiff now dwells, and at the time of the commencement of this action dwelt, at Birmingham, in the county of Warwick, which is within twenty miles from Bilston, the place where the defendant now dwells, and also within twenty miles from Wolverhampton, in the county of Stafford, the place where the defendant dwelt and carried on his business at the time this action was commenced:—"

Held insufficient.

This was a rule, calling upon the plaintiff to show cause why the judgment should not be set aside, and the plea roll brought in and filed, to enable the defendant to enter a suggestion to deprive the plaintiff of costs under the 9 & 10 Vict. c. 95, the County Courts Act.

Joyce showed cause. There is a preliminary objection to the defendant's affidavit. It does not sufficiently negative one of the exceptions, giving concurrent jurisdiction, in the 128th section of the County Courts Act, 9 & 10 Vict. c. 95. By one exception in that section, concurrent jurisdiction is given where the plaintiff dwells more than twenty miles from the defendant at the time of the action brought. Here the affidavit fails to disclose what the distance was between the *residences* of the plaintiff and the defendant at the time of action brought; it states "that the plaintiff now dwells, and at the time of the commencement of this action dwelt, at Birmingham, in the county of Warwick, *which* is within twenty miles from Bilston, the place where the deponent (the defendant) now dwells, and also within twenty miles *from* Wolverhampton, in the county of Stafford, the place where the defendant dwelt and carried on his business at the time this action was commenced." It is not enough to follow the very words of the statute. *Room v. Cottam*, 1 L. M. & P. 729; 1 Eng. Rep. 504. The defendant must show that the residences are within twenty miles; and in consequence of the delay and expense plaintiffs are put to by a suggestion, the affidavit ought to be so certain, that, if false, an indictment would lie. It is consistent with the present affidavit that the parties dwelt more than twenty miles apart. It is immaterial where the defendant dwelt at the time of the making of the affidavit. It may be contended, on the other side, that the word "which" is to be read, "which town of Birmingham," meaning the *whole town*. But, assuming that to be so, which is not conceded, the defendant has excluded the town of Wolver-

¹ Decided by ALDERSON, B., sitting alone in the Court of Exchequer Chamber. 20 Law J. Rep. (N. S.) Exch. 231.

Fry v. Whittle.

hampton from his computation of distance by the use of the word "from," unless it is contended that by the use of that word the defendant must be taken to intend to include every part of the town of Wolverhampton, which would be absurd. All that the defendant pledges himself to is, that two points of the towns of Birmingham and Wolverhampton nearest to each other are within twenty miles, and that the parties reside in those towns. That is not sufficient. He cited *Peterson v. Davis*, 6 Com. B. Rep. 235; s. c. 18 Law J. Rep. (N. S.) C. P. 343. *Johnson v. Ward*, 7 Ibid. 868; s. c. 18 Law J. Rep. (N. S.) C. P. 255. *Duck v. Barton*, 1 L. M. & P. 201; s. c. 19 Law J. Rep. (N. S.) Exch. 150. *Kirby v. Hickson*, Ibid. 364.

Pashley, in support of the rule. These affidavits are not to be construed with the strictness of a special demurrer.

[*Alderson*, B. No; but the court must see that the case is not within any of the exceptions of the 128th section.]

It is submitted this is shown. The word "which" must be read *whole town*.

[*Alderson*, B. Well, conceding that, how do you get over the word "from" ?]

The court cannot take judicial notice of the extent of any given place. It is sworn that the parties live in certain places, and that those places are within twenty miles.

[*Alderson*, B. Supposing that to be the case as regards one place, the word "from" excludes the other. If the defendant is one inch within the town of Wolverhampton, you are out of court.]

The courts have put a construction upon the word "from."

[*Alderson*, B. The point is this: Should it turn out that the residences are more than twenty miles apart, could the party making the affidavit be indicted for perjury on this affidavit ?]

An indictment could be supported.

[*Alderson*, B. To support your view, we must overturn the English language. The rule must be discharged.]

Joyce submitted that the defendant being in the wrong, the rule ought to be discharged with costs.

ALDERSON, B. I remember Lord Cranworth always said, that the party in fault ought to pay the costs. That is a sound rule, and ought to be adhered to.

Rule discharged, with costs.

London and North-western Railway Company v. M'Michael.

LONDON AND NORTH-WESTERN RAILWAY COMPANY v. M'MICHAEL.¹

Hilary Vacation, February 12, 1851.

*Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, s. 21, 22—
Calls by Instalments.*

Held, on error, that a call payable by instalments is valid.

DEBT for calls. The first count of the declaration was in the statutory form, claiming 112*l.* 10*s.* in respect of six calls upon ten shares, held by the defendant in the London and North-western Railway Company.

The defendant pleaded, *inter alia*,² never indebted.

At the trial, before Cresswell, J., at the Liverpool Summer assizes, 1850, the various calls were proved, but it appeared that the third call was made at a meeting of directors duly held on the 9th of June, 1848, and in the following words:—

“Resolved, that a call of 2*l.* 10*s.* upon every registered share be, and the same is hereby, made and ordered to be paid to any of the following bankers at the under-mentioned times and places, that is to say, 1*l.* 5*s.* per share, on the 17th of July next, and 1*l.* 5*s.* per share on the 16th of September next.”

Then followed a list of the places where the call was to be paid.

The sixth call was made on the 27th of December, 1848, for a similar amount, and payable in a similar way by instalments.

The action was brought subsequently to the last day appointed for payment. It was objected that these calls were invalid because made by instalments, and *The Ambergate, Nottingham, Boston, &c., Railway Company v. Couthard*, since reported, 19 Law J. Rep. (N. S.) Exch. 311, was cited. His lordship overruled the objection, and directed a verdict to be entered for the plaintiffs for 112*l.* 10*s.*, with liberty to the defendant to reduce the verdict by the amount of the fifth and sixth calls and interest. A rule *nisi* was accordingly obtained in Michaelmas term, against which

Willes and *Hugh Hill* showed cause.³ The calls were valid, as the directors have a general discretionary power under the 8 & 9 Vict. c. 16, s. 21, 22.⁴ By the special act 9 & 10 Vict. c. 92, under which

¹ 20 Law J. Rep. (N. S.) Exch. 233.

² See the case reported as to the evidence of the defendant's liability, 1 Eng. Rep. 414.

³ February 10, before PARKE, ALDERSON, PLATT, and MARTIN, BB.

⁴ Sect. 21 enacts, that “The several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company.”

Sect. 22 enacts, “That it shall be lawful for the company from time to time to make such calls of money upon the respective shareholders in respect of the amount of capital respectively subscribed or owing by them as they shall think fit, provided that twenty-one days' notice at the least be given of each call, and that no call exceed the

 London and North-western Railway Company v. M'Michael.

this company is incorporated, no limit is imposed either as to the amount of the calls or the time for successive calls. The directors might call for half the whole amount in one day, and the residue the next. The court will not interfere with the exercise of discretionary powers. *Macey v. Skurmer*, 1 Atk. 389. *Spring d. Tücher v. Biles*, 1 Term Rep. 435, n. The case relied upon as showing these calls to be invalid might have been decided on the ground that debt would not lie until both instalments had become due, although the court seem to have given judgment upon the other ground. Besides which, by sect. 10 of the Ambergate Act, 9 & 10 Vict. c. 4, three months was prescribed as the interval between the calls. In *The Architects' Insurance Company v. Wilson*, 16 Law Times, 124, it was held, by the Court of Queen's Bench, that such a call as this was valid. In fact, it is one call, with liberty to pay at two periods.

[*Parke, B.* The making of the call has been held, by the Court of Queen's Bench, to mean the resolutions for it being made, and from that time there can be no transfer until payment of the call.]

By the 24th section of the Companies Clauses Consolidation Act, the company may allow interest on subscriptions paid up before the time specified by the call, and if there be any inconvenience in the payment being made at two periods, and the free transfer of shares being thereby prevented, the same inconvenience would arise supposing the company made one call for the whole sum payable at the end of three years. Such call they would have the power to make, the special act prescribing no limitation upon their general authority. Practically, no inconvenience will arise, as companies will consult their own interests in making the calls in a reasonable manner. *Lawrence v. Wynn*, 5 Mee. & W. 355; s. c. 8 Law J. Rep. (n. s.) Exch. 237, shows that a call payable by instalments is good.

Cleasby, in support of the rule. The question depends upon the Companies Clauses Consolidation Act, 8 Vict. c. 16. The directors have no power to make calls payable by instalments. The term "call" means a sum of money payable at one time. The authority to make calls is contained in the 22d section, which enacts that "it shall be lawful for the company from time to time to make such calls of money upon the respective shareholders," &c. It is taken for granted that these calls are to be made in succession for twenty-one days, and notice is to be given of each call. *The Ambergate Railway Company v. Coulthard* seems expressly in point.

[*Martin, B.* In that case the action was brought before the second instalment became due. The decision, however, did not proceed on that ground. See the case as reported, 19 Law J. Rep. (n. s.) Exch. 311; and also 14 Jur. 626; 15 Law Times, 232; Rail. Cas. 223.

prescribed amount, if any, and that successive calls be not made at less than the prescribed interval, if any, and that the aggregate amount of calls made in any one year do not exceed the prescribed amount, if any; and every shareholder shall be liable to pay the amount of the calls so made, in respect of the shares held by him to the persons and at the times and places from time to time appointed by the company."

The Ambergate Railway Company v. Norcliffe.

By making calls payable by instalments, the directors tie up the hands of the shareholders and prevent them from parting with their shares. The directors are not entitled to raise a sum of money by means of one resolution, and make it payable by instalments. A call must be a thing for payment of which a day is fixed. Here no day has been appointed for the payment of the entire calls. Take the case of forfeiture of shares for non-payment of calls; if a party to prevent forfeiture has to do certain acts on several days instead of on one, he may be put to great inconvenience and difficulty. He cited 8 Vict. c. 16, s. 22, 23, 26, 29. *The Architects' Insurance Company v. Wilson*. *The Stratford and Moreton Railway Company v. Stratton*, 2 B. & Ad. 518; 9 Law J. Rep. K. B. 268. *Lawrence v. Wynn*.

[Parke, B. We will hear the case of *The Birkenhead, Lancashire, and Cheshire Railway Company v. Webster*, which turns on the same point, before we give our judgment.]

Cur. adv. vult.

THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE RAILWAY COMPANY
v. WEBSTER.¹

Hilary Vacation, February 12, 1851.

On this case being called on, and *Crompton* and *Beavan* appearing to show cause, and *Welsby* to support the rule, the court said that they were all clearly of opinion that a call made payable by instalments was good, and that the parties dissatisfied with the judgment of the court must seek their remedy in a court of error.

That the rule, therefore, in this case would be absolute, and the rule in *The London and North-western Railway Company v. M^r Michael* would be discharged.

Rules accordingly.

IN THE EXCHEQUER CHAMBER.

THE AMBERGATE RAILWAY COMPANY v. NORCLIFFE.²

Easter Vacation, May 19, 1851.

In this case, in which the same point was involved as that which was determined in the two preceding cases, the Court of Exchequer had decided against the validity of a call by instalments, and gave judgment for the defendant.

Whitehurst, for the plaintiffs in error. The question raised in this

¹ 20 Law J. Rep. (N. S.) Exch. 234.

² *Coram* LORD CAMPBELL, C. J., PATTESON, COLERIDGE, WIGHTMAN, MAULE, and CRESSWELL, JJ. 20 Law J. Rep. (N. S.) Exch. 234.

Harding v. Hodgkinson.

case has (since the writ of error was sued out) been decided by the Court of Queen's Bench in *The Architects' Insurance Company v. Wilson*, and by the Exchequer in *The Birkenhead, Lancashire, and Cheshire Railway Company v. Webster*. (He was then stopped by the court.)

Wilmore, for the defendant in error. It is submitted that the decision of the court below is correct.

[*Lord Campbell*, C. J. You have the decisions of the two courts against you. Can you argue the point?]

It is submitted that the call and the action upon it are both creatures of the stat. 8 Vict. c. 16, and that no call can be validly made unless it has all the ingredients required by the statute. In the cases cited the whole covenant was based upon sects. 21 and 22, which give power to make the call; but sects. 24, 25, 29, to which the attention of the court was not called, show that the statute contemplated that there should be only one payment. In sects. 23 and 25, the expression "amount of the call" must mean that the whole call is to be due at once.

[*Maule*, J. By no means.]

Sect. 29 gives power to the directors to declare shares forfeited if the shareholder fail to pay within two months after the day appointed for the payment of the calls. If the calls may be split, there are no means of determining what is the day appointed for the payment.

LORD CAMPBELL, C. J. It may be that the day then referred to is the day appointed for the payment of the last instalment of the call. The judgment must be reversed. There must be a *venire de novo*.

The other judges concurred.

Judgment reversed.

HARDING v. HODGKINSON.¹

Easter Term, May 3, 1851.

Witness — Competency of Person in whose Behalf Action brought—
6 & 7 Vict. c. 85.

A person entitled to a share in the proceeds of land devised to A in trust for sale, is a competent witness in an action brought by A to establish his right to the land.

TRESPASS quare clausum fregit.

Pleas — Not guilty and not possessed.

At the trial, before Patteson, J., at the Stafford Spring assizes, it appeared that the plaintiff claimed the *locus in quo*, as devisee of one Henshaw Moss, who had, by his will, devised it to the plaintiff, in

¹ 20 Law J. Rep. (N. S.) Exch. 236.

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trust to sell and divide the proceeds amongst the family of the testator. The title of Henshaw Moss rested upon evidence of acts of user; and on behalf of the plaintiff a witness named John Moss, who was, undoubtedly, one of the persons entitled to participate in the proceeds of the land when sold, was called to prove some of these acts of ownership. It was objected that he was incompetent, as being within the exception in Lord Denman's Act, 6 & 7 Vict. c. 85, the action being in part brought in his immediate and individual behalf. His lordship received his evidence, and a verdict was found for the plaintiff.

*Whateley*¹ moved for a new trial, for the improper reception of this evidence. The witness was directly interested in the action, and was in the character of *cestui que trust*, supporting a claim by his trustee.

[*Parke, B.* He has no interest in the damages.]

It was solely a question of title, as the plaintiff had no actual possession. The witness is a person in whose immediate and individual behalf the action is in part brought.

Cur. adv. vult.

The judgment of the court was now delivered by

POLLOCK, C. B. In this case the only question was the competency of a witness who was called to prove the case of the plaintiff. We are of opinion the witness was competent. The rest of the court have no doubt about it. I, at first, entertained some doubt about it; but I think the current of decisions is in favor of the reception of the testimony of that witness. Certainly the spirit of the act of Parliament which was referred to has for its object, as far as possible, to admit testimony, leaving the question of credit to the jury, who hear and see the witness. In the present case, property had been left to the plaintiff as trustee to sell and to divide the proceeds among the family of the testator. The witness whose competency was objected to was undoubtedly a member of the family entitled to call upon the trustees to account and to claim his share. We are of opinion he did not stand in the relation pointed out in the exception in Lord Denman's Act, which would have excluded him from giving evidence; and, therefore, we are of opinion that the evidence was properly received, and that there ought to be no rule for a new trial on that ground.

Rule refused.

¹ April 24, before POLLOCK, C. B., PARKE, PLATT, and MARTIN, BB.

 Spradbery v. Gillam.

SPRADBERY v. GILLAM.¹

Easter Term, May 9, 1851.

Set-off — Payment after Action brought — Nominal Damages.

Where the plaintiff at the trial proved a debt of 11*l.* 18*s.* 1*d.*, and the defendant established a defence under one plea as to 18*s.*, under a set-off as to 7*l.* 8*s.*, and also a payment of 4*l.* after the commencement of the suit, thus affording an answer to the whole of the plaintiff's demand:—

Held, that the payment having been made after the commencement of the suit, the plaintiff was entitled to a verdict, with nominal damages, on the plea of set-off.

DEBT for board, lodging, &c., with the common counts.

Pleas — First, never indebted; second, a set-off generally; third, as to 3*l.* 19*s.* parcel, &c., payment *after* action; fourth, as to two counts, the Tippling Act.

Replications — Joining issue on the first plea; *nil debet* to the set-off; traverse of payment; and *de injuria* to the fourth plea.

At the trial, before Pollock, C. B., at the Middlesex sittings after Michaelmas term last, the plaintiff having proved a debt amounting to 11*l.* 18*s.* 1*d.*, the defendant established a defence as to 18*s.* under the Tippling Act, proved a set-off as to 7*l.* 8*s.*, and a payment of 4*l.* after the commencement of the suit. The plaintiff's counsel thereupon contended that he was entitled to a verdict with nominal damages upon the plea of set-off, on the ground that the payment having been made *after* action brought, the amount proved under the plea of set-off, together with the other defences, did not equal or exceed the sum proved to be due to the plaintiff at the commencement of the suit, and that the case was in that respect distinguishable from *Tuck v. Tuck*, 5 Mee. & W. 109; s. c. 8 Law J. Rep. (N. s.) Exch. 165. The defendant had a verdict, leave being given to the plaintiff to move to enter a verdict for him for nominal damages on the plea of set-off.

A rule *nisi* having been obtained accordingly, —

Bramwell showed cause. Under the circumstances of this case, payment *after* action has the same effect as payment before action brought. The principle laid down in *Tuck v. Tuck* applies to this case.

[*Parke*, B. The plea of set-off applies to an account taken at the commencement of the suit. You are going a step beyond *Tuck v. Tuck*.]

He referred to *Henry v. Earl*, 8 Mee. & W. 228; s. c. 10 Law J. Rep. (N. s.) Exch. 265.

[*Parke*, B., mentioned *Moore v. Butlin*, 7 Ad. & E. 595; s. c. 7 Law J. Rep. (N. s.) Q. B. 20.]

Lush, contra, was not called on.

Per curiam.² The rule must be absolute to enter a verdict of 1*s.* for the plaintiff on the plea of set-off.

Rule absolute.

¹ 20 Law J. Rep. (N. s.) Exch. 237.

² POLLOCK, C. B., PARKE, ALDERSON, and PLATT, BB.

 Howard v. Kershaw.

HOWARD v. KERSHAW.¹

Easter Term, May 13, 1851.

Outlawry, Reversal of — Practice — Rule Nisi.

A rule to reverse an outlawry for error in fact, where the defendant in error has not pleaded to the assignment of error within the time allowed, is a rule to show cause only, and is not absolute in the first instance; but upon such rule being made absolute, no terms will be imposed.

COWLING² moved for a rule to reverse judgment of outlawry, on which a writ of error *coram nobis* had been brought, the error assigned being that the plaintiff in error, the defendant below, was out of the kingdom at the time of the issuing of the *exigi facias*, and of the judgment of outlawry: the defendant in error had allowed the time for pleading to the assignment of errors to expire. On an affidavit of these facts, and the record being in court, it is submitted that the rule may be absolute in the first instance. In *Greville v. Cooper*, 9 Jur. 255, only a rule *nisi* was granted, and the question is, whether that is the proper practice. Where a *scire facias ad audiendum errores* was returned and default made, the judgment was reversed upon motion without making it a *concilium*. *Walmsley v. Roson*, 2 Str. 1210.

Per curiam. You state new facts, and the defendant in error is entitled to have an opportunity of answering them. It must be a rule to show cause.

Atherton now showed cause. The time being out for pleading, there is no answer upon the record; and if the plaintiff in error is entitled to judgment, he ought to take it without coming to the court, but having asked for their assistance, terms may be imposed.

Per curiam. If you have no answer to the facts stated on the part of the plaintiff, he is entitled to judgment and to set aside the outlawry, without any terms being imposed.

Rule absolute.

¹ 20 Law J. Rep. (N. S.) Exch. 237.

² May 6, before POLLOCK, C. B., PARKE, PLATT, and MARTIN, BB.

 Embrey & another v. Owen.

 EMBREY & another v. OWEN.¹

Easter Term, April 30, 1851.

Rights to flowing Water, Air, and Light — Irrigation of Land — Appreciable Quantities — Practice.

Flowing water, air, and light are bestowed by Providence for the common benefit of men; and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie.

A riparian proprietor has a right to irrigate his land by water from the stream, provided he does not thereby interfere with the rights of the other riparian proprietors; and whether the use made by him of the stream for this purpose be reasonable and permitted, or not, depends on the circumstances of each case.

Where an action on the case, founded on such an irrigation, was brought against a riparian proprietor by another having a mill lower down on the stream, it appearing that the irrigation did not take place continuously, but only at intermittent periods, when the river was full, and that no damage was done thereby to the working of the mill, and that the diminution of the water was not perceptible to the eye:—

Held, that this was a reasonable use of the water by the defendant, for which no action could be maintained.

In that action the defendant pleaded, first, the general issue; and, secondly, that J. J. was possessed of four closes on the bank of the stream above and of the bed of it up to the middle, that the water immemorially flowed over that part of the bed, and that at certain periods of the year, viz., in January, February, and March, when the water was more than sufficient for the use of the mill, the defendant, as the servant of J. J., diverted small and reasonable quantities of the water for the irrigation of those closes, which, excepting such small quantities as were absorbed and used in the irrigation, were returned into the stream above the mill, &c. The plea then averred that the diversion was not continuous, but only intermittent, and that the quantities of water absorbed and lost were very small and unappreciable, and that the diversion caused no damage or impediment to the plaintiff's mill. To this plea the plaintiff replied *de injuria*. At the trial the judge, in directing the jury on this plea, told them that he felt great difficulty in affixing a legal meaning to the term "unappreciable," but suggested that it might mean "so inconsiderable as to be incapable of value or price:" and the defendant obtained a verdict generally. The court inclined to think this interpretation of the word "unappreciable" erroneous, but considering the defendant entitled to succeed on the general issue, refused to set aside the verdict if he would consent to its being entered for the plaintiff on the special plea.

CASE. The first count of the declaration alleged that the plaintiffs were lawfully possessed of certain water grist mills, and of right ought to have had and enjoyed the benefit and advantage of the water of a certain stream or watercourse, which ought to have run and flowed unto the said mills for the supplying the same with water for the working thereof, save and except at such times and on such occasions when it might be reasonable and necessary to irrigate or water certain closes of the defendant situate and being on the southern side of the said stream or watercourse, and near to the same, with reasonable quantities of the water thereof; and assigned as a breach that the defendant, at times when it was not reasonable or necessary to irrigate or water the said closes of the defendant, &c., and for divers different and other purposes than the irrigating or watering the same, wrongfully and injuriously cut, dug, made, and erected, &c., in, upon, and near to the sides and banks of the said

¹ 20 Law J. Rep. (N. S.) Exch. 212. 15 Jur. 633.

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stream, &c., and at a part thereof above the said mills, divers sluices, trenches, channels, aqueducts, and cuts, and kept and continued the same for a long time, &c., and thereby unlawfully and wrongfully diverted and turned divers large quantities of the water of the said stream, &c., out of and away from the said mills, and stopped, prevented, and hindered the water of the said stream, &c., from running or flowing along its usual course to the said mills, and from supplying the same with the necessary water for the working thereof, &c., as the same of right ought to have done and otherwise would have done; and by reason thereof the water of the said stream, &c., sufficient for the supplying of the said mills, could not run or flow to the same, &c.; and the plaintiffs thereby, for want of such sufficient water, could not during that time use their said mills, or follow, use, or exercise their trade or business therein in so large, extensive, and beneficial a manner as they might and otherwise would have done, but were thereby deprived of the use and enjoyment of their mills and of the benefits, profits, gains, and advantages which they otherwise would have made by carrying on their trade and business therein. There were two other counts in the declaration; but the course which the cause took at the trial renders it unnecessary to refer to them. The defendant pleaded in all eighteen pleas, raising various issues, some on the declaration itself, and some on certain new assignments; but the only pleas of importance were the first, fourth, seventh, and tenth, as follows: First, to the whole declaration, not guilty. Fourthly, to the first count, that one John Jones before and at the said several times, &c., was lawfully possessed of divers, to wit, four closes situate and being on the bank of and next adjoining to and extending to the middle of the stream of the said stream and watercourse, to wit, on the north side thereof, and at a part of the said stream or watercourse above the said mills, and which said closes were other than the closes on the southern side of the said stream or watercourse in the said first count mentioned, and part of which said several closes whereof the said John Jones was so possessed as aforesaid, &c., hath from time whereof the memory of man runneth not to the contrary been covered with the water of the said stream or watercourse, which from time whereof, &c., hath been used and accustomed to run and flow in its usual flow, stream, and current over part of and unto and by the said last-mentioned closes, for the watering, fertilization, and general benefit and advantage thereof; that at certain intermittent periods and times during divers months of the year, to wit, the months of January, February, and March, the said periods and times being periods and times when the waters of the said stream or watercourse are most abundant and flow in great quantity and abundance, and are more than sufficient or necessary and flow in greater quantity than can be used for the due and proper working of the said mills, right and proper, and fit, necessary, and requisite to water and irrigate the said first-mentioned closes with the water of the said stream, &c., for the more convenient enjoyment and occupation and substantial improvement and cultivation of the said closes, and for rendering the same fertile and productive and conducive to the public and general

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weal and advantage; wherefore the defendant at the said several times when, &c., the same being reasonable and proper times in that behalf respectively, and during the said months of January, February, and March, and the waters of the said stream then being most abundant, &c., as the servant of the said John Jones, and by his command, diverted and turned divers small quantities of the water of the said stream, the same being reasonable and fit and proper quantities in that behalf, and not more than was necessary and convenient for the purpose of irrigating and watering the said first-mentioned closes, &c., and then caused the same to flow in, over, and upon the same, and which said quantities of water, save and except such small portions and quantities thereof as were necessarily absorbed and used by and in the passing over the said closes in and by the course of the irrigating and watering thereof as aforesaid, then fell, passed, flowed, and returned into and unto the said stream, &c., at divers parts and places of the same, above the said mills, and before the said stream, &c., reached and arrived at the same; and for the purposes aforesaid the defendant, &c., as the servant of the said John Jones and by his command, cut, dug, made, and erected, &c., in, upon, and near to the sides and banks of the said stream, &c., at a part of the same above the said mills, a certain sluice, trench, channel, or aqueduct, and kept and continued the same, &c., in, upon, and near to the said sides and banks of the said stream, and thereby diverted and turned the said small quantities of the water of the said stream, &c., as she lawfully might for the cause aforesaid; which were the same grievances in the first count mentioned. The plea concluded with this averment: "And the defendant further saith, that the diversion and abstraction aforesaid was not nor is a continuous diversion, but only takes place at intermittent periods and in manner in this plea aforesaid, and that the quantities of water so absorbed and used as aforesaid, and stopped, prevented, and hindered from running and flowing to the said mills, were and are very small and *unappreciable* quantities, and not more or greater than were and are necessary for the purposes in this plea aforesaid, and that the same were and are not required, and had at no time theretofore been appropriated by the plaintiffs for the purpose of working the said mills or any other purposes, and that the diverting, turning away, and abstracting, and stopping, hindering, and preventing the same from flowing to the said mills, did not at any time cause any damage, hinderance, or impediment to the due, proper, and necessary working and using of the said mills." The seventh and tenth pleas were similar to the fourth, and were pleaded respectively to the second and third counts. The plaintiff joined issue on the first plea; and to the fourth, seventh, and tenth, replied *de injuria*. At the trial, before Talfourd, J., it appeared that the plaintiffs were occupiers of a water grist mill, situate on the bank of the River "Rhiew," in the parish of "Berriew," in Montgomeryshire. The defendant, Mrs. Owen, was the owner of land on that river, above the mill; and this action was brought against her for diverting part of the water of the stream for the purpose of irrigating certain meadows on its northern bank, which were in the occupation of her

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tenant, John Jones. The evidence showed that the defendant did divert the water, by means of a cut and aqueduct, when the river was full, for the purpose of irrigating those meadows, and that there was a loss of a portion of water by absorption and evaporation. The working of the plaintiffs' mill was not however in the least impeded, and the quantity thus lost was differently calculated by the scientific witnesses on both sides, one for the plaintiffs estimating it at four or five per cent.; one for the defendant, at only one seventh per cent., even in summer; but all the witnesses concurred, that there was no sensible diminution of the stream by reason of the diversion, none cognizable by the senses; and that the amount of the loss was ascertainable only by inference from scientific experiments on the absorption and evaporation of water poured out on soil. On the first and fourth issues the judge left two questions to the jury. First, Were the quantities of water absorbed and evaporated in the process of the defendant's irrigation small and *unappreciable* quantities? Secondly, Did the abstraction of water by the defendant cause any sensible diminution of the natural flow of the water of the stream? Both these questions having been answered by the jury in favor of the defendant, the first in the affirmative, and the second in the negative, the judge directed a verdict for the defendant on those issues. On the fourth issue he left the question to the jury in the terms of the plea, i. e., whether the quantities of water lost were small and *unappreciable*; intimating, however, that he felt great difficulty in affixing a legal meaning to this latter term, but suggesting that it might mean "so inconsiderable as to be incapable of *value* or *price*." The defendant obtained the verdict generally, with leave reserved to the plaintiffs to move to enter a verdict on the first, fourth, seventh, and tenth issues.

Welsby, in Michaelmas term, obtained a rule accordingly; and if necessary, to enter judgment for the plaintiffs *non obstante veredicto* on the fourth, seventh, and tenth issues. This rule was argued at the sittings in banc after Hilary term.

Bramwell and *Bevan* showed cause. The plaintiffs seek to maintain this action in virtue of a supposed right in them, as *riparian* proprietors, to have *all* the water of the stream to flow to their mill without any diminution whatever. But the admission of such a principle would be highly injurious to the community, and go far to realize the dogma, "*La propriété, c'est le vol*." Rivers run for the benefit and advantage of all persons through whose lands they flow, and not for the exclusive benefit and advantage of those whose lands lie at their mouths. Every riparian proprietor is entitled to use the stream for all its natural or normal purposes, domestic and agricultural; as for instance, he may drink the water, by himself or his cattle, bathe in the stream, take water for the use of his habitation, &c.; subject, however, to the limitation that he do no injury to the other riparian proprietors who have the same rights in the stream as himself. Thus, he could not justify the setting up a steam engine on

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the banks of the river which would send all its water away in steam, or the establishing public baths which would consume it in large quantities. The law is thus laid down in 3 Stark. Ev. 1248, 3d ed.: "The right of a land owner to use and apply the water of a stream which runs through the lands of various proprietors depends, partly on the peculiar nature of the subject matter, partly on principles already noticed. The water of a running stream is *publici juris*, which each successive proprietor has a right to use in passing, but which is the property of no one; but if one of such owners appropriates the water by applying it to a particular purpose, he has a right to do so, provided he does not thereby prejudice any other owner in his previous use and appropriation of the water to other purposes." This view is supported by *Mason v. Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1; and *Williams v. Morland*, 2 B. & Cr. 910; 2 Bl. Com. 18. In Com. Dig., "Action upon the case for a nuisance," C, also, it is said that the action for nuisance does not lie "if a man use water in his own land out of a watercourse running through his land to the pond of B, whereby B's pond is not so full; if he does not divert the watercourse;" for which is cited a decision by St. John at Suffolk, A. D. 1657, in *Smart v. Stisted*. A contrary doctrine would lead to great absurdity, for if the right claimed by the plaintiffs really exists, it cannot be dependent on the *size* of the river; so that a person living at the mouth of the Thames, the Severn, or even the Mississippi, would have a right of action against any person living higher up on its banks who used a small portion of its water.

[*Parke, B.* The question whether the right of irrigation is among the natural rights of those who are entitled to use the stream was raised in *Wood v. Waud*, 3 Exch. 748; 13 Jur. 472; but it became unnecessary to decide it.]

That case is distinguishable, for there the act of the defendant alone, independent of the acts of others, would have done actual damage. The law in America on this subject is in accordance with our view; *Blanchard v. Baker*, 8 Greenl. 253; as also is that of Scotland; 2 Hutcheson's Just. Peace, 391. "The Lawyer," by McCallum, Advocate. *The Magistrates of Linlithgow v. Elphinstone*, 3 Kames's Select Decisions, 331. The other side will probably rely on 3 Stark. Ev. 1250, 3d ed., note 7: "In a case before Wood, B., at Carlisle, where the water, having been used for the purpose of irrigation, was afterwards returned into the ordinary channel, the learned judge nonsuited the plaintiff; but as it appeared that by so doing a portion was lost in consequence of absorption and irrigation, the Court of King's Bench, as I am informed, afterwards set aside the nonsuit." The case there referred to, however, is not only an anonymous one and reported *ex relatione*, but it neither mentions the quantity of water absorbed, nor gives any reasons for the judgment.

[*Alderson, B.* There was a case of *Dakin v. Cornish* tried before me at Leeds, in 1845, where water was taken from the River Ayr to work a steam engine. There was an artificial course from the river to a reservoir in the yard of a mill; the water was there mixed with other water obtained from the earth, the whole was then used for the

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steam engine, what remained was transferred into another tube and carried back to the river; and the question was, whether this was an injury to some other mills lower down on the stream. We took much care about the case; and I left it to the jury to say if the same quantity of water continued to run in the river as if none of its water had ever entered the premises of the defendant, as if so he was entitled to their verdict. Master *Bennett* and *Welsby* here stated that that case is not reported, and the reporter has not been able to find it.]

But even supposing the defendant in this case were a mere stranger, entitled to no rights whatever in the stream, it is found as a fact by the jury that the quantity of water diverted from it was so small as to be "unappreciable," and not affecting its natural current in the slightest degree. If this be so, the defendant is entitled to succeed on the general issue, for "*de minimis non curat lex*," and not guilty means not guilty of taking any injurious quantity. The other side will complain of the judge's explanation of the term "unappreciable," and will contend that for the purposes of this case "appreciable" means that which is appreciable *in se*, without reference to the bulk from whence it is taken. But, according to that argument, the taking a glassful of water from a river would give a right of action. The rights to light, air, and running water are analogous. If a man burns a fire at a mile from the house of another, he must to a certain extent depreciate the air, but no action would lie for this.

Welsby, Foulkes, and C. W. W. Wynn, contra. The principal question in this case goes to the whole of the rule, is of some novelty, and of great importance. Whatever may have been held in former times, it must be taken as an established principle, since the case of *Mason v. Hill*, that the right to flowing water, like the right to light or air, is *publici juris*; so that every riparian proprietor through whose land it passes is entitled by natural right to have the stream flow on in its natural current. And the only exceptions to this are those uninjurious ones introduced by the common law, viz., that every person, whether riparian proprietor or not, may take water for his domestic purposes, or to consume by the mouths of his cattle, provided in so doing he does not alter the natural channel of the stream. Any other interference with it is a disturbance of the right of the riparian proprietor, and consequently the subject of an action, even though no *pecuniary* damage may have ensued; for it is an established principle of law that any disturbance of a *right* is in itself ground for an action, as being *injuria sine damno*. 1 Smith's L. C. 131; 2 Wms. Saund. 114, 6th ed.; 1 Wms. Saund. 346 a, b, note 2. *Ashby v. White*, 2 Ld. Raym. 938. Vin. Ab., "Watercourses," C, pl. 3. *Weller v. Baker*, 2 Wils. 414. *Hobson v. Todd*, 4 T. R. 71. *Pindar v. Wadsworth*, 2 East, 154. *Marzetti v. Williams*, 1 B. & Ad. 415. *Mason v. Hill*. *Bower v. Hill*, 1 Bing. N. C. 549. *Williams v. Mostyn*, 4 M. & W. 145. There is good reason for this; for an unusual interference with the stream by a riparian proprietor, especially by any permanent means, such as a pump, aqueduct, or the like,

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would, if continued for twenty years, either confer an easement or be evidence of one; and although this would not hold in the case of a stranger on whom no usage could confer such a right, still if one person were allowed to take an inappreciable quantity of water, fifty others might do the same, and thus an appreciable quantity be taken for which no one would be liable.

[*Alderson, B.* Formerly when a question was raised by government with respect to the right of persons to take water from Portsmouth Harbor, Lord Abinger said, "An old woman must not take a bucket of water from that harbor, lest a seventy-four should not float."]

In Bract. lib. 4, fol. 221, *a*, "Eodem modo imponitur quandoque a jure et nec ab homine nec ab usu, s. ne quis faciat in proprio per quod damnum vel nocumentum eveniat vicino. Nocumentum enim poterit esse justum, et poterit esse injuriosum. Injuriosum, ubi quis fecerit aliquid in suo injustè contrà legem vel contrà constitutionem, prohibitus a jure. Si autem prohiberi a jure non possit ne faciat, licet nocumentum faciat et damnosum, tamen non erit injuriosum, licitum est enim unicuique facere in suo quod damnum injuriosum non eveniat vicino, ut si quis in fundo proprio construat aliquod molendinum, et sectam suam et aliorum vicinorum substrahat vicino, facit vicino damnum et non injuriam: cùm a lege vel a constitutione prohibitus non sit ne molendinum habeat vel construat. Item a jure imponitur servitus prædio vicinorum, s. ne quis stagnum suum altius tollat per quod tenementur vicini submergatur. Item ne faciat fossam in suo per quam aquam vicini divertat, vel per quod ad alveum suum pristinum reverti non possit in toto vel in parte. Item ne quid faciat in suo, quo minus vicinus suus omninò uti possit servitute imposità vel concessâ, vel quo minus commodè utatur, loco, tempore, numero vel genere, qualitate vel quantitate. Et non refert utrùm hoc omninò facerit vel quod tantundem valeat." In *Gale on Easements*, p. 137, ed. 1849, "The right principle to be collected from the authorities appears to be, that continued beneficial enjoyment of a running stream is evidence of the right to have the stream run on its accustomed course; and that no one can interfere with such accustomed course unless justified by an easement to do so." And p. 396, "Although, generally, some injury must have been sustained before redress can be had, yet, if the necessary consequence of what has already been done will be an injury to an easement, it is not a condition precedent to the exercise of the remedy, that actual damage shall have accrued." *Wood v. Waud*, rightly considered, disposes of this question.

The court, in delivering judgment, say, "The fact found by the jury is, that the defendants (whose works have been erected within twenty years, and who have no right, by long enjoyment or grant, so to do) have fouled the water of the natural stream, by pouring in soap suds, wool combers' suds, &c.; but that pollution of the natural stream has done no actual damage to the plaintiffs, because it was already so polluted by similar acts of mill owners above the defendants' mill, and by dyers still farther up the stream, and some sewers

of the town of Bradford, that the wrongful act of the defendants made no practical difference, that is, that the pollution by the defendants did not make it less applicable to useful purposes than such water was before. We think, notwithstanding, that the plaintiffs have received damage in point of law. They had a right to the natural stream flowing through the land, in its natural state, as an incident to the right to the land on which the watercourse flowed, as will be hereafter more fully stated; and that right continues, except so far as it may have been derogated from by user or by grant to the neighboring land owners. This is a case therefore of an injury to a *right*. The defendants, by continuing the practice for twenty years, might establish the right to the easement of discharging into the stream the foul water from their works. If the dye works and other manufactories, and other sources of pollution above the plaintiffs, should be afterwards discontinued, the plaintiffs, who would otherwise have had, in that case, pure water, would be compellable to submit to this nuisance, which then would do serious damage to them. We think, therefore, that the verdict must be entered for the plaintiffs on every part of not guilty to the first count." The court then proceed to an examination of the *American Cases*, and declare that they consider the law put on its right footing in *Mason v. Hill*. As to foreign nations, although America, being a new country possessed of very large rivers, might be supposed to require a different law in this respect from England, its authorities support our view. This appears from Gale on Easements, 131, 132: "In the courts of the United States, which recognize and profess to be guided by the principle of the English law, this point has received much fuller consideration than in the reported decisions of the English courts. In an elaborate judgment of Mr. Justice Story, this right to have a stream flow on in its accustomed course is laid down to be a right universally incident to the property in the adjoining land; a right which can only be interfered with by the acquisition of an easement; and the ordinary rights of the owners of the adjacent land to the natural flow of the stream are distinguished with great precision from the acquisitions in derogation of the common rights made by an exclusive appropriation of the water. 'Prima facie, *Tyler v. Wilkinson*, 4 Mason, U. S. R. 397, every proprietor on each bank of a river is entitled to the land covered with water, in front of his bank, to the middle thread of the stream; or, as it is commonly expressed, *ad medium filum aquæ*. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but a simple use of it while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of the river, the right being common to all the proprietors on the river; no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or throw it back upon a proprietor above. This is the necessary result of the perfect equality

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of right among all the proprietors of that which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows, for that would be to deny any valuable use of it. There may be, and there must be allowed to all, of that which is common, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current, indispensable for the general and valuable use of the water, perfectly consistent with the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious, by diminishing the value of the common right, in an implied element in the right of using the stream at all," &c. So in the case already referred to of *Blanchard v. Baker*, the court say, "A mill privilege not yet occupied is valuable for the purposes to which it may be applied. It is a property, which no one can have a legal right to impair or destroy, by diverting from it the natural flow of the stream, upon which its value depends; although it may be impaired by the exercise of certain lawful rights, originating in prior occupancy. If an unlawful diversion is suffered for twenty years, it ripens into a right which cannot be controverted. If the party injured cannot be allowed in the mean time to vindicate his right by action, it would depend upon the will of others whether he should be permitted or not to enjoy that species of property." In the case which has been cited from Kames's *Select Decisions* it is said, "Hence it follows, that no man is entitled to divert the course of a river or any of its branches; which would be depriving others of their right, viz., the use of the water. . . . But what is the middle course that we are at liberty to take? An excellent practical rule is laid down in the Roman law, which is, that we cannot divert from a river any rill or runner that has a perennial course." But at all events, on the finding of the jury, the plaintiffs are entitled to a verdict on the special pleas. The *onus* of proving them lay on the defendant, and she has failed to do so. The true meaning of the word "unappreciable" is, that which is not measurable, not that which is not susceptible of value or price, and all the evidence given at the trial showed that the quantity of water taken from this river was measurable.

During the argument, the cases of *Mellor v. Spateman*, 1 Wms. Saund. 343; *Glynne v. Nichols*, 2 Show. 507; Comb. 43, and *Palms v. Heblethwait*, Skin. 175, were referred to by the bench; and at its close Bramwell directed their attention to Gale on *Easements*, 132, 133, and 333-335.

Cur. adv. vult.

The judgment of the court, consisting of Parke, Alderson, Platt, and Martin, BB., was now delivered by

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PARKE, B., (after fully stating the pleadings and facts.) We are not prepared to say that the learned judge at *nisi prius* was correct in his interpretation of the word "unappreciable" when connected with the word "quantity," nor sure that he was not; for the word "unappreciable" or "inappreciable" is one of a new coinage, not to be found in Johnson's Dictionary, or Richardson's. The word "appreciate" first appears, in our dictionaries, in the last edition of Johnson by Todd, 1827, with the explanation "to estimate," "to value," and assuming that to be the true meaning, which we suppose it is, the compound adjective signifies that the quantities were not capable of being *estimated* or *valued*, and in that sense the fourth plea was not proved. It is, however, a matter of little importance, for assuming that the word was wrongly explained, the only consequence would be that a question would arise, whether the fourth issue and the others involving the same terms ought not to have been found for the plaintiffs, a question we need not decide; for if the issue on not guilty remains as it now is, found for the defendant, as we think it ought to be, there should be no new trial if the defendant consents, as she probably will, that the fourth and other corresponding issues should be found for the plaintiffs. This course was adopted in *Stead v. Anderson*, 4 C. B. 836; 11 Jur. 877.

The important question is that which arises on the plea of not guilty, the jury having found that no sensible diminution of the actual flow of the stream to the plaintiffs' mill was caused by the abstraction of the water. That the working of the mill was not in the least impeded was clear on the evidence. On that finding we think the verdict was properly ordered to be entered for the defendant.

It was very ably argued before us by the learned counsel for the plaintiffs, that the plaintiffs had a *right* to the full flow of the water in its natural course and abundance, as an incident to their property in the land through which it flowed; and that any abstraction of the water, however inconsiderable, by another riparian proprietor, and though productive of no actual damage, would be actionable because it was an injury to a *right*, and if continued would be the foundation of a claim of adverse right in that proprietor.

We by no means dispute the truth of this proposition with respect to every description of right. Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage — *injuria sine damno* is actionable — as was laid down in the case of *Ashby v. White*, 2 Ld. Raym. 938, by Lord Holt and many subsequent cases; which are all referred to, and the truth of the proposition powerfully enforced, in a very able judgment of the late Mr. Justice Story, in 3 Sumn. Rep. 189, *Webb v. The Portland Manufacturing Company*. But in applying this admitted rule to the case of rights to running water, and the analogous cases of rights to air and light, it must be considered what the nature of those rights is, and what is a violation of them.

The law as to flowing water is now put on its right footing, by a

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series of cases — beginning with that of *Wright v. Howard*, 1 Sim. & S. 190; followed by *Mason v. Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1, and ending with that of *Wood v. Waud*, 3 Exch. 748; 13 Jur. 472; and is fully settled in the American courts. See 3 Kent's Comm. Lect. 52, 439-445.

The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans* to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. See 5 B. & Ad. 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.

This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of *all* the water in its natural state; if it were, the argument of the learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.

It is only therefore for an unreasonable and unauthorized use of this common benefit that an action will lie; for such a use it will; even, as the case above cited from the American Reports shows, though there may be no *actual* damage to the plaintiff. In the part of Kent's Commentaries to which we have referred, the law on this subject is most perspicuously stated, and it will be of advantage to cite it at length: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, (*currere solebat*,) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. 'Aqua currit et debet currere' is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbor

below him, who has an equal right to the subsequent use of the same water. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variation in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect the application of the water by the proprietors below on the stream. He must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbor. Pothier lays down the law very strictly, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law: 'Sic enim debere quem meliorem agrum suum facere, ne vicini deteriore faciat.'

In America, as may be inferred from this extract, and as is stated in the judgment of the Court of Exchequer in *Wood v. Waud*, a very liberal use of the stream for the purposes of irrigation and for carrying on manufactures is permitted. So in France, where every one may use it "en bon pere de famille, et pour son plus grand avantage." (Code Civil, art. 640, note *a*, by Pailliet.¹) He may make trenches to conduct the water to irrigate his land, if he returns it with no other loss than that which irrigation caused. In the above-cited case of *Wood v. Waud*, it was observed that in England it is not clear that a user to that extent would be permitted, nor do we mean to lay down that it would in every case be deemed a lawful enjoyment of the water, if it was again returned into the river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor.

This must depend upon the circumstances of each case. On the one hand it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part on the stream, could be permitted to irrigate them continually by canals and drains,

¹ See his *Manuel de Droit Français*. Paris, 1838.

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and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering pot into the stream in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not, and in this we think, that as the irrigation took place, not continuously, but only at intermittent periods, when the river was full and no damage was done thereby to the working of the mill, and the diminution of the water was not perceptible to the eye, it was such a reasonable use of the water as not to be prohibited by law. If so, it was no infringement of the plaintiff's right at all; it was only the exercise of an equal right which the defendant's employer had to the usufruct of the stream.

We are therefore of opinion that there has been no injury in fact or law in this case, and consequently that the verdict for the defendant ought not to be disturbed.

The same law will be found to be applicable to the corresponding rights to air and light. These also are bestowed by Providence for the common benefit of men, and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. A man cannot occupy a dwelling and consume fuel in it for domestic purposes, without its in some degree impairing the natural purity of the air; he cannot erect a building, or plant a tree, near the house of another, without in some degree diminishing the quantity of light he enjoys; but such small interruptions give no right of action; for they are necessary incidents to the common enjoyment by all.

Rule discharged, the defendant consenting that the verdict on the fourth, seventh, and tenth issues be entered for the plaintiffs.

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IN THE EXCHEQUER CHAMBER.

[ERROR FROM THE COURT OF EXCHEQUER.]

[Coram LORD CAMPBELL, C. J., PATTESON, MAULE, WIGHTMAN, CRESSWELL, ERLE, and WILLIAMS, JJ.]

BOOSEY v. JEFFERYS.¹

Easter Vacation, May 17 and 20, 1851.

Copyright — Right of a Foreigner to, in this Country.

A foreign author residing abroad, who composes a work abroad, and sends it to this country, where it is first published under his authority, acquires a copyright therein; and a British subject, to whom such work is assigned by the foreign author, also gains such right.

Boosey v. Purday, 4 Exch. 145, overruled.

An assignment of copyright, if valid according to the law of the country where it is made, is valid here.

B. composed an opera in Milan, and assigned it there, according to the law of Milan, to one R., who assigned it in England, according to the English law, to the plaintiff, who published it in this country before any publication abroad:—

Held, that the plaintiff might maintain an action for the infringement of the copyright of such work.

THIS was a writ of error brought upon a bill of exceptions which had been tendered to the ruling of Rolfe, B., under the following circumstances: The action was in case, and the declaration stated, that at the time of the committing of the grievance the plaintiff was, and from thence has been and is, the proprietor of the copyright in certain books, being musical compositions—ten airs in the opera of “*La Sonnambula*” of Bellini—which said several books had each of them been first printed and published in England, and which had each of them been first published within twenty-eight years then last past, and which said copyright was subsisting at the time of the committing of the grievance; yet the defendant, not being the proprietor of the said copyright, heretofore, after the passing of the 5 & 6 Vict. c. 45, and within twelve calendar months before the commencement of the suit, unlawfully, &c. The pleas were: first, that the plaintiff was not the proprietor of the copyright; and, secondly, that there was not at the time when, &c., a subsisting copyright in the said compositions. Issue was joined upon these pleas; and at the trial the following facts appeared: Bellini, a foreigner, composed the opera of “*La Sonnambula*” in 1831, when it was performed with much success at the Carcano Theatre at Milan. In February, 1831, a Signor Ricordi purchased the opera of Bellini and the managers of the theatre, under an instrument which, according to the law of Austria, was sufficient to transfer the copyright, but there was not any attesting witness to it. On the 9th of June, 1831, Ricordi assigned the opera by deed to the plaintiff, who caused ten of the airs in it to be entered at Stationers’ Hall, and copies were also deposited at the British Museum. On the 13th of May, 1844, the plaintiff also pro-

¹ 15 Jur. 540.

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cured the airs to be entered, under the 5 & 6 Vict. c. 45. At a later period, the airs were purchased at the defendant's shop in London. The facts being similar to those in *Boosey v. Purday*, 4 Exch. 145, the learned judge ruled accordingly, that a foreign author residing abroad, who composes a work abroad, and sends it to this country, where it is first published under his authority, acquires no copyright, and that a British subject, to whom such work is assigned by the foreign author, does not gain any such right.

Bovill, for the plaintiff in error. The object of this writ of error is to bring the case of *Boosey v. Purday*, 4 Exch. 145, under review, and to decide the question whether a foreigner can have any copyright in this country, or whether such right can be vested in any person who has purchased from such foreigner. There is also another question — whether there can be any assignment by a foreigner of a portion of the copyright to be confined to Great Britain, and whether an assignment made in Milan ought to have been attested by two witnesses. The facts were these: Boosey was an English subject, and having purchased the copyright in "*La Sonnambula*," he was the first person to publish it in this country. He had thus a *prima facie* title against the world, which now was sought to be impeached, upon the ground that the work was originally composed by a foreigner, out of the British dominions. Bellini had transferred his interest in the work to Ricordi at Milan. Ricordi came to England and transferred the right which he had thus acquired to Boosey. The main question was, whether an English subject could acquire from a foreign author the copyright of a work which was first published in this country. If a foreigner could acquire such right, he could transfer it; and even if he had no right, yet he might enable an English subject to acquire the protection of the copyright law for himself. On the other side it was said, that, under the circumstances of this case, there was no copyright either in the foreigner or in the British subject. At common law, a man had a property in the produce of his brain. This doctrine is asserted, and the reasons for it are given, in the celebrated case of *Millar v. Taylor*, 4 Burr. 2303, 2330, 2335, 2340, 2345, 2346. Copyright contains every essential element of property at common law.

[*Lord Campbell*, C. J. A court of equity will grant an injunction against the publication of a private letter; property is thereby recognized in the writer, although he has parted with the manuscript; that was only to give the person to whom he sent it an opportunity of having his sentiments, and not to transfer the property in the letter to him.]

The first statute upon this subject, 8 Ann. c. 19, does not refer to copyright as a new right, but assumes a property to have existed therein, and to have been made the subject of purchase and sale. Its very object was to protect purchasers. The title is, "An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies;" and the recital in the preamble, that persons have "*of late frequently* taken the liberty of printing books without the consent of the authors or proprietors," shows that proprietorship was considered to be different from author-

ship, and might be acquired. The enactment is, that the author of any book already printed, "who hath not *transferred* to any other the copy, or who hath *purchased or acquired* the copy, &c., shall have the sole right of printing for a certain term. In the case of *Prince Albert v. Strange*, 1 Hall & T. 1, the lord chancellor, in delivering judgment, said, "The property in an author or composer of any work, whether of literature, art, or science, such work being unpublished and kept for his private use or pleasure, cannot be disputed, after the many decisions in which that proposition has been affirmed or assumed." If so, and if the right of circulating many copies rests upon the same ground as property in one copy, copyright exists, and is capable of transmission. The first publication gives the exclusive right, the only exception being, that if there was a prior publication in another country, the work becomes *publici juris*. Such being the true foundation of copyright, it follows that a foreigner must be entitled to it. The law makes no distinction, as to personal property, between alien *amis* and the subjects of this realm. This rule is laid down in the earliest books. An alien can maintain an action for the purpose of defending his reputation. *Pisani v. Lawson*, 6 Bing. N. C. 90; *Cocks v. Purday*, 5 C. B. 860, 882; Com. Dig., "Alien," C. 5. The International Copyright Acts, 1 & 2 Vict. c. 59, and 7 & 8 Vict. c. 12, confirm the view suggested on the part of the plaintiff in error.

[*Maule, J.* An alien might purchase the copyright of an English book, and compel specific performance of the contract.]

Yes. In Br. Ab., tit. "Denizen," pl. 10, it is said to have been decided by the whole court, that "an alien born may have an action personal, and shall be answered without any disability, and that he may possess property, and buy and sell." The last Alien Act, 7 & 8 Vict. c. 66, s. 4, declares that alien friends may hold personal property; and the Copyright Act, 5 & 6 Vict. c. 45, s. 25, declares copyrights to be personal property. Assuming that the common-law right of foreigners is controlled by the statute of Anne in the same manner that the right of native-born subjects is, then they are in the same position as far as the statute is concerned. It has been argued, however, that the statute applies only to British subjects; but if so, the common-law right of foreigners remains unaffected by the statute, and this action can be maintained. If the test of property be control and possession, it can make no difference whether the work be written here or abroad, or whether it be brought here by the author, or his deputy or transferee. It is said, in accordance with the judgment in *Boosey v. Purday*, that the statute of Anne was passed for the encouragement of native talent alone, and that all the statutes relating to this subject, being *in pari materia*, must be taken to have that as their object. Why should the enactments be thus confined? It is manifestly for the advantage of the British public that foreign literature should be encouraged.

[*Maule, J.* If copyright be a benefit not only to the author, but also to the public, that is a reason why it should be extended to foreign writers.]

According to the judgment of the House of Lords in *Donaldson v.*

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Beckett, 2 Bro. P. C. 129, the statute of Anne was not passed to protect British authors, but to limit their rights. It is a restrictive statute as regards authors. The words in the recital of 8 Ann. c. 19, are "for the encouragement of learned men to compose and write useful books." That must refer to the public advantage. Then the act of Victoria is "to afford greater encouragement to the production of literary works of lasting benefit to the world." The Court of Exchequer have made the statute of Anne what they considered it should be, on general grounds of policy; but the language of the act must be regarded.

[*Lord Campbell*, C. J. The court will regard the policy of an act, but not reasons of general policy.]

The policy of an act is to be gathered from its language. The words are, "*the author of any book*;" and there is not any language restricting its provisions to British authors. In *Becke v. Smith*, 2 M. & W. 195, Parke, B., lays down the proper rule for the construction of statutes. It cannot be said that the restrictions in the statute of Anne would not apply to foreigners in this country, and it would be an anomaly to hold that the greater portion of the act applied to them, and not the other portion. But, in fact, the whole of the statute is prohibitory, if there was a copyright at common law; and if prohibitory, it clearly applies to foreigners who may come within the realm. This was declared as long ago as in the reign of Henry VIII. By stat. 32 Hen. 8, c. 16, s. 9, all foreigners who shall come into this realm shall be bound by the laws of this realm. This is merely declaratory of a principle in the law of nations. The *onus* lies upon the other side of showing that aliens are excluded under the general words of the statute of Anne. But the only ground urged for this construction is one of supposed policy. If the question be argued upon that footing, there are far stronger reasons for giving to foreigners, who publish here, a property in their works, than for denying it to them. On questions of policy, other statutes may be referred to. 1 Rich. 3, c. 9, was passed soon after the discovery of printing; it prohibits aliens from following the occupation of handicraftsmen in this realm; but it is expressly declared that it shall not extend to be "an impediment to any merchant stranger, of what nation or country he be, for bringing into this realm, or selling by retail, any books, written or printed, or for inhabiting within this said realm for the same intent, or any scrivener, illuminator, reader, or printer of such books," &c. (Sect. 12.) And thus it was from the invention of printing until the reign of Anne. Where it is intended to confine a remedy or a right to the United Kingdom, it is so expressed. Thus the Engravings Act, 17 Geo. 3, c. 57, expressly applies only to such prints, &c., as shall be engraved "in any part of Great Britain." If a foreigner were to produce an engraving in this country, he would be protected. The limitation as to place excludes limitation as to persons. But if not, there may be reasons for a distinction between engravings and books, as engraving is a manual art, and is practised rather to please the senses than to improve the mind. It would not be necessary to consider this act relating to engravings, except that a

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case decided upon it (*Page and others v. Townsend*, 5 Sim. 395) has been pressed into the service of the defendant in error. In that case it was held, that prints engraved and struck off abroad, but published here, are not protected from piracy. The decision there proceeded on the ground that the prints were not engraved in the United Kingdom; but it is not applicable to the present case, as the language of the statutes is altogether different. So, when it has been thought advisable to confine the operation of statutes to British subjects, express words have been used for that purpose. 13 Eliz. c. 7, s. 1, has the words, "if any merchant, being subject born of this realm," &c. So, 1 Jac. 1, c. 15, s. 1. The Statute of Monopolies, 21 Jac. 1, c. 3, includes foreigners within its prohibitory enactments. The words in the exception as to manufactures are general, yet foreigners every day take out patents for them.

[*Maule, J.* The whole effect of that statute is to restrain the power of the crown from granting monopolies; patents are granted, therefore, not under the statute, but at common law, unrestrained by the statute.]

There is an analogy between the statutes relating to patents and those which regulate copyright. The words "first and true inventor" are used in the one, where the word "author" is used in the other. Foreigners are, in fact, included, because they are not expressly excluded. The Licensing Act, 13 & 14 Car. 2, c. 33, s. 6, contains general words, but it could never be contended that it does not apply to foreigners. Statutes restrictive of common-law rights surely include foreigners, and the Copyright Acts are of this character. The practice under the statute of Anne is shown by the summary of the authorities in *Chappell v. Purday*, 14 M. & W. 319. "The result of the *dicta* and the authorities is, that a foreign author, or his assignee, may have the benefit of the statute if his publication be in England, but otherwise not." That was in 1845; since that time there have not been any decisions to the contrary, but several in favor of conferring copyright upon foreigners. *De Londre v. Shaw*, 2 Sim. 237, is not opposed to these cases. The marginal note there does not truly represent the case. It does not appear that any statutes were cited on that occasion, but the case was put upon the ground of fraud. The *dictum* of the judge was quite unnecessary, as no question of copyright was before him. It may be correct as to a publication abroad.

[*Maule, J.* The meaning of that case is, that foreigners have no title to a *quasi* copyright under the circumstances.]

That and *Page v. Townsend* are the only decisions which are relied upon for overturning a series of *dicta* and authorities, and the uniform practice upon the subject. The question is of great importance, as an enormous amount of property is involved in its decision, and that circumstance alone shows that for a long time this right has been relied upon. The authorities are uniform in favor of foreigners when the first publication is here, and such cases as may at first sight appear to be against them are distinguishable. The first in point of date, though not a decision upon the point, the right having been

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assumed in it, is *Bach v. Longman*, 2 Cowp. 623. In *Bentley v. Foster*, 10 Sim. 329, Shadwell, V. C., who was supposed to have decided differently in *De Londre v. Shaw*, said, "that, in his opinion, protection was given by the law of copyright to a work first published in this country, whether it was written abroad by a foreigner or not." The question was directed to be tried at law, but, according to the reporter's note, the defendant consented to a verdict being taken against him. *Clementi v. Walker*, 2 B. & Cr. 861. *D'Almaine v. Boosey*, 1 Y. & C. 288. *Chappell v. Purday*, 14 M. & W. 319. *Cocks v. Purday*, 5 C. B. 860. *Boosey v. Davidson*, 13 Jur. 678; 18 L. J., Q. B., 174. *Ollendorff v. Black*, 14 Jur. 1080; s. c. 1 Eng. Rep. 114. These are all the authorities, and they are uniform. The Court of Exchequer supposed that *De Londre v. Shaw* and *Page v. Townsend* left the question open, so that it might be decided upon principle. There is nothing more mischievous than thus to disturb a course which has been for a long time adopted.

[*Lord Campbell*, C. J. Lord Lyndhurst once said, that where there has been long usage, the legislature may be taken to have sanctioned it by not correcting it.]

As to the assignment, *Cocks v. Purday* decides that it is valid if made according to the law of the country where it takes place. If valid by the law of Austria, it became valid every where by the law of nations. Story's Conflict of Laws, s. 242.

Peacock, for the defendant in error. A foreign author residing abroad, and not coming here at the time of the first publication of his work, is not entitled to copyright, even though he may have assigned his interest to an Englishman, or to any other person who may be in this country. The question is, When was the work first published, and where did the author then live? In this case Bellini was the author, and he was abroad at the time of the first publication. A person cannot assign what he has not himself. At common law a person had a right to restrain another from making public what he had not written, but not from multiplying copies of that which he had published.

[*Maule*, J. Is not that contrary to the opinion of the judges in *Millar v. Taylor*? They there use the word "copyright" in its ordinary sense.]

Clementi v. Walker decided that if a work be published abroad, any one here may publish it; and the question is, whether an author is to reside abroad, and yet to say, you shall not publish the work here. There is a distinction between patents and copyright. An assignee of a patent has the same right as the inventor, but an author has a greater right than his assignee. The word "author" in the Copyright Act means author in this country, as under the Statute of Monopolies the word "inventor" means inventor in this realm. The invention must be brought to this country.

[*Maule*, J. Suppose the true inventor, residing abroad, sends over here and takes out a patent, is it not valid?]

Probably it is, if granted to an agent.

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[*Maule, J.* You have to make out that a foreigner, living abroad, cannot take out a patent here. If it is contrary to policy that he should do so, the trust vested in the agent would not give him the right, any more than an alien could have an estate in trust for him and his heirs.]

Erle, J. "First inventor" means first introducer of the knowledge of the invention to this country.]

If the invention be sent over by the agent, it may be sufficient. The statute of Anne recites sufficient to show that there was no copyright before its passing.

[*Maule, J.* It protects books already published. The Court of Exchequer, in *Boosey v. Purday*, thought proper to maintain two propositions: first, that there was no copyright at common law; and, secondly, that the statute of Anne did not give it to foreigners. If it did not exist at common law, it was not given by statute. It is agreed that if a foreigner publish first in his own country, he has no copyright; but has he not, if he publishes first here, not by coming bodily, but through an agent?]

If he assigns before publication, he is not the author at the time of publication. A publication by an assignee is not a publication by the author within the statute. The right to become an author is not assignable. *Bayley, J.*, in *Clementi v. Walker*, said, "The British legislature must be supposed to have legislated with a view to British interests and the advancement of British learning. By confining the privilege to British printing, British capital, workmen, and materials would be employed, and the work would be within the reach of the British public. By extending the privilege to foreign printing, the employment of British capital, workmen, and materials might be suspended, and the work might never find its way to the British public. Without very clear words, therefore, to show an intention to extend the privilege to foreign publications, I should think it must be confined to books printed in this kingdom; and instead of there being any such clear words to show that intention, there are provisions which strongly imply the latter." *Page v. Townsend, De Londre v. Shaw, and Guichard v. Mori*, 9 L. J., Ch., 227, are in favor of the defendant in error. Another question arises upon the transfer. The decisions upon the statute of Anne are to the effect that assignments of copyright must be in writing, in the presence of two witnesses. *Davidson v. Bohn*, 6 C. B. 456, where all the cases are collected.

[*Maule, J.* Where was the assignment there?]

In England. Can a foreigner give a right to publish here in a different manner from a subject? Although the assignment to the plaintiff was in this country, and according to English law, yet the assignment from Bellini to Ricordi was not so. Ricordi could not have sued here.

[*Lord Campbell, C. J.* But if you allow that Ricordi had all the right of Bellini, and he assigned it here, it was the same as if Bellini had assigned to the plaintiff.]

This property is locally situate in this country, and its transfer

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being regulated by statute, it must be assigned accordingly. It is the same with canal shares and stock in the funds. Story's Conflict of Laws, s. 383. In *Clementi v. Walker*, a parol transfer in Paris was held insufficient.

Bovill, in reply.

May 20. LORD CAMPBELL, C. J., now delivered the following judgment: This was an action for pirating a musical composition, entitled "A Cavatina, from the Opera of *La Sonnambula*," by Bellini. The declaration, which is in the common form, alleges that this musical composition had first been published in England within twenty-eight years; that the plaintiff was the proprietor of the copyright therein; and that the copyright was subsisting at the time when the grievances complained of were committed. The defendant pleaded — first, that the plaintiff was not the proprietor of the copyright in the declaration mentioned; secondly, that there was not, at the time of the committing of the said supposed grievances, a subsisting copyright in the composition. The trial came on before Rolfe, B., (now Lord Cranworth,) and evidence was given on behalf of the plaintiff that the opera of "*La Sonnambula*," from which the composition in question was taken, was composed by Bellini, an alien, at Milan, in February, 1831; that Bellini then resided, and had ever since resided, at Milan; that by the law of Milan he was entitled to the copyright in this work, and to assign it to any one he pleased; that on the 19th of February, 1831, by an instrument in writing, signed by him at Milan, he did, according to the law of Milan, assign the copyright to Ricordi, also an alien; that such copyright, and the right to assign the same, became vested in Ricordi; that on the 9th of June, 1831, Ricordi, in England, made, signed, and sealed an indenture, attested by two witnesses, whereby, for a valuable consideration, he assigned the opera of "*La Sonnambula*," for and in Great Britain, to the plaintiff, who was a native-born British subject; that the plaintiff published the opera of "*La Sonnambula*" in London on the 10th of June, 1831; that there had been no prior publication of it in Great Britain, or any other country; that on the 10th of June, 1831, the plaintiff made the usual entry at Stationers' Hall in respect of the publication, and deposited copies at the British Museum and other places; and on the 13th of May, 1844, he caused further entries to be made at Stationers' Hall, according to the 5 & 6 Vict. c. 45. The learned judge, in conformity with the decision of the Court of Exchequer in *Boosey v. Purday*, told the jury that that evidence was not sufficient, and directed them to find a verdict for the defendant. To this ruling a bill of exceptions was tendered, upon which the present writ of error was brought.

After listening to a very learned argument, we are all of opinion that the evidence was sufficient to entitle the plaintiff to a verdict on both the issues, and, therefore, there must be a *venire de novo*. The first question discussed was, whether authors had a copyright in their works at common law. That is not essential to our determination

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of the present case ; if it were, we are strongly inclined to agree with Lord Mansfield and other judges, who in several cases declared themselves to be in favor of the common-law right of authors ; but we rest our judgment on the statutes concerning literary property, which, we think, entitled the plaintiff to maintain this action upon the evidence adduced on the trial. The Court of Exchequer, in *Boosey v. Purday*, 4 Exch. 145, overruling the prior decision of that court on the equity side, the decision of the Common Pleas, and the decision of the Queen's Bench, authorities all directly in point, expressed an opinion that in such an action the right of the plaintiff must depend on the statute law of this country ; that the laws of foreign nations have no extra territorial power ; and that the proper construction of the statutes of Anne and George III. is, that a foreign author residing abroad was not an author within their meaning, and could not have the benefit of those works which were intended for the encouragement of British talent and industry, by giving to British authors, or their assigns, a monopoly in their literary works, dating from the period of their first publication here. The learned judge, therefore, who tried this case, held, that a foreigner, by publishing his work in Great Britain, acquired no copyright. If these premises are sound, the inference drawn from them is incontrovertible, that a British subject, who purchases from a foreigner such a right as he had in his own country, cannot be in a better condition here than the foreigner would have been himself. But, with great deference to an opinion so expressed, we see no sufficient reason for thinking that it was the intention of the legislature to exclude foreigners from the benefit of the statutes. The British Parliament has no power, and cannot be supposed, to legislate for aliens beyond the British territory ; but within that territory it has the power, and, as we conceive, the general words of the statutes must be presumed to do so. The monopoly which the statutes conferred is to be enjoyed here, and the conditions which they require for enjoyment are to be performed here. What is there to rebut the presumption that aliens are entitled ? The 8 Ann. c. 19, is intituled " An Act for the encouragement of learning." Assuming the legislature intended this necessarily for the encouragement of learning in Great Britain, may it not be highly for the encouragement of learning in this country that foreigners should be induced to send their works here, to be first published in London ? If Rapin and De Lolme had written their valuable works without ever visiting this country, could it be contended that they should be debarred from assigning their property to the publisher ? It would ill become us to offer opinions upon the free introduction of agricultural produce or manufactures ; but, looking at the statutes, we may without impropriety observe, that it has been the uniform policy of Parliament to facilitate the importation of foreign literature. Although printing had been introduced and carried on by Caxton in the time of Edward IV., when an act passed in the reign of Richard III. to restrain foreigners from carrying on trade here, a provision was added that it should not extend to prevent any trader, of whatever nation he might be, from

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bringing into this country any books, written or printed. The question really is, whether a foreigner, by sending to a publisher his work here, acquires a copyright. Upon this depends his right to transfer his own right to another. It is admitted that a foreigner, if he composes a literary work here, may acquire a copyright; and Mr. Peacock would not deny, that if a foreigner, being here for a temporary purpose, were to write a poem, he might publish it, and acquire a copyright in it here. If he had composed it in his own country, and brought it over in his memory, and produced it here for the first time, or if he had written out a book in manuscript, would it make any difference as to his rights? Can his personal appearance within our realm be essential to his right as an author, if he does that by an agent which it is not disputed he might do in his own proper person? The right is to acquire a monopoly in England for the sale of his work; this right is personal property, which he carries with him wherever he is, and all that is to be done with reference to it, he may do by another. Where, then, can be the necessity of crossing from Calais to Dover before giving instructions for the publication of his work, and entering it at Stationers' Hall? The law of England will protect his property and recognize his rights, and give him redress for wrongs inflicted on him here.

In the sixth year of the reign of Henry VIII, the Common Pleas held that aliens residing in France might maintain an action of debt here, although aliens can have no land. It has been held that an alien, although he had never been in this country, might maintain an action for an injury to his reputation contained in a libel; and that great judge, Tindal, C. J., has observed, that it would create in foreigners an unfavorable opinion of our laws, if we held that aliens could not maintain an action of this description; and my brother Maule likewise points to the fact of our courts going further, in allowing actions to be brought by foreigners for running down ships upon the high seas. If Gibbon, after writing the "Decline and Fall" at Lausanne, had published it here, could it be doubted, that while domiciled there he would not have acquired the same right as an English author? For such a purpose, what difference can it make, whether the author be an alien or a natural-born subject? In the present case I suppose it would be admitted, that the defence would have been done away with, if Bellini had been naturalized by act of Parliament. For these reasons we think that if an alien, residing in his own country, were to compose a literary work there, and should continue to reside there, without publishing his work, but should cause it to be published in this country, he would be an author for the encouragement of learning, and might maintain an action against any one who should pirate his work. We wish to be understood as speaking of the rights of a foreigner first publishing his work in England, for if a literary work is once published, an author can only claim a copyright by the law of the country in which it is first published. This is the doctrine of our courts, and the legislature must be considered as having adopted and sanctioned it by the enactment of international statutes. Mr. Peacock contended, that though an

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alien, residing abroad, might publish here, he could not transfer the right to another; but if, by the law of a foreign country in which he resides, the right may be assigned, the assignee of the author or his assignee becomes the owner of the property. It consists in the right of retaining a monopoly for the sale of a work in the country in which it is first published. Whatever right the author of this work had of publishing in England was transferred by him to Ricordi, and by Ricordi to the plaintiff. With regard to the authorities which have been cited, we may perhaps be justified in saying that they are rather in favor of the doctrine we adopt. One point still remains. Mr. Peacock argued that there is upon the evidence no valid assignment to Ricordi, there being no allegation that it was attested by two witnesses. Now, looking at the assignment in the bill of exceptions, it might be presumed that there was such an assignment executed as was sufficient; but at all events we think the title sufficient, upon the statement that Bellini assigned to Ricordi according to the law of Milan. This is not like a conveyance of real property in England, or an assignment of personalty in England, which must be attested in a particular form. When this assignment was made, it had no reference to England, and it was sufficient to clothe Ricordi with all the rights of property in the opera of "La Sonnambula." The assignment by Ricordi to the plaintiff was made according to all the forms of English law. Upon the whole, we think the learned judge ought to have directed the jury, that if they believed the evidence, they should find a verdict on both issues for the plaintiff; and, therefore we direct a *venire de novo*.

Judgment accordingly.

BURKINSHAW v. THE BIRMINGHAM AND OXFORD JUNCTION RAILWAY COMPANY.¹

Trinity Term, June 5, 1850.

Railway Company — Compensation — Lands Clauses Act — 8 Vict. c. 18, s. 18, 68 — Notice of taking Land — Actual Taking.

A railway company being desirous of taking the plaintiff's land for their railway served him with a notice, pursuant to the 8 Vict. c. 18, stating that they required to purchase and take his land for the railway. The plaintiff afterwards, pursuant to the provisions of the 8 Vict. c. 18, s. 68, served the company with a notice requiring them to issue their warrant to the sheriff to summon a jury to inquire into the value of the land, claiming to be paid by way of compensation for the purchase by them of the fee simple of the land:—

Held, that as the land had not been actually taken or actually injuriously affected by the company, within the meaning of the 68th section, the plaintiff was not entitled to compensation.

DEBT. The declaration stated that the defendants were a railway company, and that the plaintiff was the owner in fee of certain lands in Birmingham; that the defendants required the lands for their rail-

¹ 20 Law J. Rep. (N. S.) Exch. 246.

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way; that they served a notice on the plaintiff that they required to purchase the same for their railway, and would treat for the purchase thereof. The declaration then averred that the defendants took the said lands, whereby the plaintiff was entitled to the sum of 4500*l.* as compensation, and alleged non-payment thereof as a breach.

Plea traversing the taking of the lands.

At the trial, before Pollock, C. B., at the Middlesex sittings after Hilary term, 1850, the facts were as follows: In 1847, the Birmingham and Oxford Junction Railway Company being desirous of taking, for the purposes of their railway, land of which the plaintiff was the owner in fee, in 1847 served him with the following notice, pursuant to the Lands Clauses Consolidation Act. 8 Vict. c. 18:—

“ Notice.

“ In pursuance of the Birmingham and Oxford Junction Railway Act, 1846, I do hereby, on behalf of the company, give you notice that the said railway will pass through the messuages, &c., situated in the parish of Birmingham, in the county of Warwick, and numbered 140 on the plan and in the book of reference deposited with the clerk of the peace for the county of Warwick, and which premises belong, or are reputed to belong, to you, &c. And I further give you notice that the said railway company require to purchase and *take* the said premises for the purposes of the said railway, and that the premises so required to be purchased and taken are colored red upon the plan hereunto annexed, and that the said company are willing to treat for the purchase thereof, and of all subsisting leases, &c., and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works. And the said company do hereby demand from you the particulars of your estate and interest in the said premises, and of the claims made by you in respect thereof, such particulars to be delivered at the office of the secretary of the said company, No. 34 Bennett's Hill, Birmingham, not later than twenty-one days from the service of this notice. And the said company do hereby demand and require of you to produce to the secretary, at his office aforesaid, within twenty-one days from the service of this notice, any lease or grant for a longer period than one year, under or in respect of which you have, or claim to have, any estate or interest in the said premises. Dated this 7th day of January, 1847.

JOHN KIRSHAW,

“ Secretary to the said company.

“ To Mr. Charles Burkinshaw.”

Nothing more was done by either party until July, 1849, when the plaintiff, in pursuance of the provisions of the Lands Clauses Consolidation Act, served the company with a notice requiring them to issue their warrant to the sheriff to summon a jury to inquire into the value of the land in question, and claiming to be paid by way of compensation for the purchase by them of the fee simple of the land. The company having taken no further steps in the matter, the present action was commenced. The only question being, whether

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the defendants could be said to have taken the lands of the plaintiff within the meaning of the act of Parliament, a verdict was taken for 4500*l.*, with leave to the defendants to move to enter a verdict for them, or to tender a bill of exceptions.

Whateley having, on the 17th of April, 1850, obtained a rule *nisi* accordingly, —

Martin, Aspland, and *T. Y. Lee* showed cause, (May 30, 1850.) The only question in this case is, whether the railway company have taken the plaintiff's lands. That turns upon the construction of the Lands Clauses Consolidation Act, 8 Vict. c. 18, the material parts of which are sects. 16 to 68.¹ The plaintiff contends that, if the railway company does not take the necessary steps for summoning a jury within twenty-one days under sects. 39 and 68, the amount of compensation claimed by the owner of the land becomes a debt due to him. The effect of a compliance with the 18th section is to entitle the company to the land, and to tie the hands of the owner. He has then no further interest in the land, and of course is rendered incapable of parting with it. In fact, he has lost all dominion over the land. In *The King v. The Hungerford Market Company*, 4 B. & Ad. 327, the court determined that the effect of a notice given to take the land was final and irrevocable. The company have twenty-one days allowed them, and if they do not within that time summon a jury, the matter is completed. The transaction is not to be called a contract, but a parliamentary purchase. The 39th section gives to the company alone authority to issue the warrant. The owner is without a remedy; he has no right to a *mandamus*. They referred to and commented upon the following cases: *Stamps v. The Birmingham, Wolverhampton, &c., Railway Company*, 17 Law J. Rep. (N. S.) Chanc. 431. *Salmon v. Randall*, 3 Myl. & Cr. 439. *Eaton v. The Midland Great Western Railway Company*, 10 Irish Law Rep. 310. *Walker v. The Eastern Counties Railway Company*, 5 Rail. Cas. 469. *Corrigal v. The London and Blackwall Railway Company*, 5 Man. & G. 219; s. c. 12 Law J. Rep. (N. S.) C. P. 209. *Ramsden v. The Manchester, &c., Railway Company*, 1 Exch. Rep. 723. *Doe d. Hutchinson v. The Manchester, &c., Railway Company*, 14 Mee. & W. 687; s. c. 15 Law J. Rep. (N. S.) Exch. 208. *The Queen v. The Commissioners of Woods and Forests*, 17 Law J. Rep. (N. S.) Q. B. 341. The 8 Vict. c. 18, s. 21, 36, 39, 65, 68, 80, 84, 89; the 8 Vict. c. 19, s. 36; and the 8 Vict. c. 20, s. 8 and 9.

¹ Sect. 18. "When the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special act, or any act incorporated therewith, they are authorized to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this act to sell and convey or release the same, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works."

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Whateley and *F. Robinson*, in support of the rule. The railway company did not, by the mere act of giving notice, take possession of the land. There would have been some weight in the argument on the other side, if it had been the duty of the company to issue a precept for a jury. The railway company were not compellable to put themselves in motion within twenty-one days. The 68th section of the Lands Clauses Act applies to cases where the company have actually taken possession. If the argument on the other side is correct, that the owner of the land has a remedy by action, why did not the Court of Queen's Bench refuse the *mandamus* in the case of *The King v. The Hungerford Market Company*? The question is not whether the company have become liable to take the land, but whether they have actually taken it. The case of *Stone v. The Commercial Railway Company*, 4 Myl. & Cr. 122, only shows that the company had come under a liability to take the land, and that in a court of equity they might be considered to have taken it.

Cur. adv. vult.

✓ The judgment of the court¹ was now given by

ALDERSON, B. This was a motion to enter a verdict for the defendants; and the question raised at the trial, and argued by Mr. Martin for the plaintiff and by Mr. Whateley for the defendants, is a very important one. The plaintiff is the proprietor of three houses, which were included in the property liable to be taken by the defendants under their acts for making a railway. In pursuance of the powers contained in the act 8 Vict. c. 18, s. 18, notice was on a certain day given by the promoters of the undertaking to the plaintiff that his property would be required by them for it, and by the notice they demanded of him the particulars of his interest therein, and stated their willingness to treat with him for the purchase of the same. These particulars were duly furnished, and a value of 4500*l.* put on them by the plaintiff, which amount he claimed from the promoters as a compensation for taking these premises. He required payment of this amount, or that a warrant should be issued by the company to summon a jury to assess the proper amount under the provisions of the act. The company neglected for twenty-one days and upwards to do either, and the question is, whether the plaintiff upon these facts can maintain an action and recover as damages the amount of 4500*l.* so claimed by him; and this depends on the construction to be put by the court on the 68th section of the 8 Vict. c. 18. By that section, when lands shall have been taken for or injuriously affected by the execution of the works, and for which the promoters shall not have made any satisfaction, a party claiming a compensation exceeding 50*l.* may have it settled by arbitration or by a jury; and if he selects, as he has done here, a jury, the promoters are bound to summon one in twenty-one days, and, in default thereof, are made liable to pay the party so entitled the amount of the com-

¹ POLLOCK, C. B., ALDERSON, ROLFE, and PLATT, BB.

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pensation so claimed, and the same may be recovered by action with costs in any of the superior courts. Now, the question here is, What is the meaning of the words "lands taken for the execution of the works"? For it is to such lands alone that the clause applies. It has been determined upon several occasions by Lord Cottenham, and, independently of his high authority, we entirely concur in that opinion, that when a company, as here, give notice to a party that they require his lands for their works, it amounts to an agreement by them for the purchase of those lands, assented to by the opposite party, on the terms of making the compensation in the way appointed by the act, under which such notice is given, and binds both parties finally. In some sense, therefore, lands, upon such notice being given, may be described as lands taken for the execution of the works. And so in one case the Court of Queen's Bench called them, and we think correctly. But the point is, whether the lands taken, in the 68th section, mean lands actually taken into the possession of the company, and them alone; and after carefully considering the various clauses of the act preceding the 68th section, we have arrived at the conclusion that this is the correct construction.

The whole of this part of the act, beginning at the 16th section and ending at the 68th inclusive, seems to us to form, so to speak, one code on this subject, and to provide successively for all the various cases that were likely to occur. It is preceded by this preamble: "And with respect to the purchase and taking of lands otherwise than by agreement, be it enacted." Then follow the 16th and 17th sections, providing when those powers may be put in force. And then follows the 18th, as giving notice of the lands required, and the compulsory treating for the same in case the notice does not lead to an agreement without further dispute. The disputed claims, if under 50*l.*, are settled by the 22d and 24th sections by the determination of the justices in all cases; if the compensation exceeds 50*l.*, then by the 23d section an option is given to the party claiming to have an arbitration, and if this be adopted, it is to be carried into effect by the sections beginning at the 25th and ending at the 37th inclusive. Then begin the clauses as to the settlement of the dispute by the verdict of a jury when the party claiming appears. These end with the 57th inclusive. The 58th to the 67th then follow. As to the assessing of the value of the lands comprised in the notice in the case of owners who are absent, this is to be done by a surveyor duly appointed, with a limited power of subsequent arbitration or assessment by a jury if required by the absent party.

Now, these provisions really exhaust the whole of the cases in which the company gives notice of requiring the lands of the owners adversely, when the company requiring them are not in possession of the lands, and can only obtain that possession upon payment of the ascertained compensation. But another class might exist and require to be provided for, in which the above provisions could not be applied, and that was the class when the company had been permitted to take possession without any distinct agreement for compensation, or when in the execution of their works injury, not origi-

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nally in the contemplation either of the company or of the owners, was actually incurred. And the literal meaning of the words "lands which shall have been taken or shall have been injuriously affected," not "lands which *shall be* taken, or shall be injuriously affected," clearly, we think, points to this class alone. Independently, therefore, of the argument, not an unimportant one, that the construction contended for by Mr. Martin would not give full effect to both the 23d and 68th sections, but make them in some degree inconsistent, we have come to the conclusion that, upon the true construction of the 68th section, the words "lands taken," &c., include only lands actually taken, or actually affected injuriously by the company, and consequently that these lands not having been so taken, this action cannot be sustained against the defendants. The result is, therefore, that the rule must be made absolute.

Rule absolute.

NEAT v. HARDING & BOWNS.¹

Easter Term, April 24, 1851.

Money had and received — Waiver of Trespass.

A and B (the defendants) went together to the house of the plaintiff's mother, and A seized there a sum of money belonging to the plaintiff. There was some evidence of A and B having gone with the intent to get the money, but there was no evidence that B went into the house. They subsequently paid the money into a bank to their joint account:—

Held, that the plaintiff might waive the trespass, and maintain an action for money had and received against the two defendants.

ASSUMPSIT for money had and received.

Plea — *Non assumpsit*.

At the trial, at the Wiltshire Spring assizes, before Martin, B., it appeared that the plaintiff's mother had been for a long period in the receipt of parochial relief, and that, in consequence of suspicions having been excited that her poverty was pretended, the defendant Harding, the assistant overseer for the Calne Union, and the defendant Bowns, one of the Wiltshire county constabulary, went together to her house. There was some evidence that they went for the purpose of obtaining the money that was expected to be found, but there was no evidence that the defendant Bowns went into the house. The defendant Harding searched the house, and found and took away 163*l*, which was afterwards taken to a bank by both the defendants, and paid in to their joint account. The money was proved to belong to the plaintiff. It was objected at the trial, that, under these circumstances, the action for money had and received was not maintainable against the defendants. His lordship overruled

¹ 20 Law J. Rep. (N. S.) Exch. 250.

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the objection, and a verdict was found for the plaintiff, leave being reserved to the defendants to move to enter a nonsuit.

Kinglake, Serj., now moved accordingly. In some cases a wrongful act may be waived, and *assumpsit* brought instead of trespass or trover; but that doctrine will not apply where the act complained of is a bare trespass, and unconnected with any collateral matter. It is very difficult from an act done upon an assumed title, as by an administrator whose administration is subsequently repealed. *Lamine v. Dorrell*, 2 Ld. Raym. 1216. In none of the cases has it been held that a sum of money taken by an act of trespass could be recovered as money had and received. He referred to *Hunter v. Prinsep*, 10 East, 378. *Lightly v. Clouston*, 1 Taunt. 112. *Taylor v. Plumer*, 3 M. & S. 562. In *Turner v. Cameron's Coalbrook Steam Coal, &c., Company*, 20 Law J. Rep. (N. S.) Exch. 71; s. c. 2 Eng. Rep. 342, the court intimated their doubts whether a person in possession of land and wrongfully turned out by a trespasser, who occupies the land to his exclusion, can waive the trespass and recover for use and occupation. The consequences may be very different, whether the defendants are sued as upon a contract, or for a tort. Here, too, there was no joint taking.

POLLOCK, C. B. We are all of opinion that there should be no rule in this case. The principle is, that the owner of property wrongfully taken has a right to follow it, and adopt any act done to it, and treat the proceeds as money had and received to his use, subject to certain exceptions. This doctrine was carried very far in *Taylor v. Plumer*, and fully explained in the judgment of Lord Ellenborough. In this case the money of the plaintiff was taken, and it did not cease to be his property when it was in the hands of the defendants, and he might choose to take it again. The mere presence of the defendant Bowns would not have sufficed to make him liable, but by concurring in the disposition of it he became a party to the transaction. The plaintiff is, therefore, entitled to recover the money.

PARKE, B. I am of the same opinion. When the money was paid by both into their joint account, it was the same thing as if both had taken it; and the plaintiff had the option of suing either in trespass or for money had and received. In the case of goods being taken and sold, as it is explained by Mr. Justice Powell in *Lamine v. Dorrell*, the owner may adopt the act of the wrong-doer, and treat the sale as by his agent. It is not necessary to go so far in the present case; but it is sufficient to say that money taken, as in the present instance, and invested by the defendants jointly, can be sued for in an action for money had and received.

PLATT, B., concurred.

MARTIN, B. If this case had stood singly upon the taking the money in the house, I should have had doubts if an action for money

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had and received would lie, as it is an action on a contract arising out of a tort, and torts and contracts are of a very different nature; but when it was proved, as it was, that, after taking it, the two defendants paid it into the bank in their joint names, it was clear to me that they made themselves responsible for the money. As soon as that act was proved, an action for money had and received was maintainable. It makes no difference whether it be goods or money which is originally taken.

Rule refused.¹DOE d. PATRICK & others v. BEAUFORT.²

Easter Term, April 30, 1851.

Ejectment—Canal Company—Statute, Construction of.

Ejectment to recover a portion of the land and banks of the Swansea Canal. In 1779, P., being seized of the above-mentioned land, demised the same to M. & Co. for sixty-five years. In 1798, the Swansea Canal Company was formed for making a canal, which was intended to pass, amongst other places, in part through the land in question, and they obtained an act for that purpose. In 1797, M. & Co. and the Duke of B. widened a canal made by M. & Co., and extended the same through part of the above land, which canal joined and formed a continuation of the Swansea Canal. The powers for making a portion of the canal which passes through a portion of the lands sought to be recovered were obtained by the Duke of B. and M. & Co. By that act it was enacted, sect. 47, that upon payment or tender of certain sums of money, adjudged by certain commissioners or assessed by juries, for the purchase of any such lands, &c., it should be lawful for the canal com-

¹ The current of authorities hold that if goods are wrongfully taken, the tort cannot be waived, and *assumpsit* maintained, unless upon a special promise, or unless the goods have been sold, and, it would seem, turned into money. *Stearns v. Dillingham*, 22 Vermont, 624, (1850.) *Jones v. Hoar*, 5 Pickering, 285, (1827.) *Allen v. Ford*, 19 Pickering, 217, (1837.) *Sturtevant v. Waterbury*, 2 Hall, 449, (1829.) *Willet v. Willet*, 3 Watts, 277, (1834.) *Morrison v. Rogers*, 2 Scammon, 317, (1840.) *Berly v. Taylor*, 5 Hill, 577, (1843.) *Guthrie v. Wickliffe*, 1 A. K. Marshall, 83, (1817.) And the same remedy exists, if the property so wrongfully taken has been manufactured into another article, and, in that state, has been sold and converted into money. *Gilmore v. Wilbur*, 12 Pickering, 120, (1831.) But it has been held not necessary that the tort-feasor should have received money for the goods, but that if he has sold them, and received payment in real estate, or a promissory note, an action for money had and received will still lie against him. *Miller v. Miller*, 7 Pickering, 133, (1826.) And in *Appleton v.*

Bancroft, 10 Metcalf, 231, (1845,) an officer who had sold goods attached upon *memorandum process*, pursuant to statute, was held liable in an action for money had and received, although he had not at the time received *any thing* in payment; it being his duty to sell for cash.

The necessity of a sale by the wrongdoer, in order to render him liable in *assumpsit*, seems not to have been recognized in *Hill v. Davis*, 3 New Hampshire, 384, (1826.) And see, to the same effect, *Floyd v. Wiley*, 1 Missouri, 430. So in *Stockell v. Watkins*, 2 Gill and Johnson, 326, (1830,) it was held that where goods tortiously taken were returned to their owner, he might maintain *assumpsit* for their value, during the time of the detention. And this is closely in analogy with allowing a master, whose apprentice has been wrongfully seduced from his service, to maintain *assumpsit* for his wages against the wrongdoer, although he has never promised to pay therefor. *Lightly v. Clouston*, 1 Taunton, 112, (1808.) *Foster v. Stewart*, 3 Maule and Selwyn, 191, (1814.)

² 20 Law J. Rep. (N. S.) Exch. 251.

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pany to enter upon such lands, or before such payment or tender by leave of the owners and occupiers, and thereupon such lands shall be vested in such company. The lands sought to be recovered in this action formed part of the lands authorized to be taken by the canal act. No payment or satisfaction was made or agreed to be made to the owners of the lands, but every thing was done by the Duke of B. with the full consent and approbation, and in accordance with the wishes, of such owners and proprietors. The defendant, in 1835, became the assignee of the said Duke of B. One J. C., in 1800, became the purchaser of the said lands, and the interest therein afterwards became vested in the lessors of the plaintiff at the expiration of the lease in 1845 :—

Held, that the lessors of the plaintiff were entitled to recover possession of the lands.

THIS was a special verdict, stating in substance as follows: The action was brought to recover so much of the land and banks of the Swansea Canal, &c., as lay within certain lands called Tyr Arnalt, Yuis Howell, and the Copper House lands, in the parish of Llangevelach, Glamorganshire, being copyhold lands of the manor of Penard and fees of Kittle Lunnnon and Trewyddfa. In 1779, J. B. Popkin was seized of the lands above mentioned. The defendant is now lord of the said manor and fees. In 1799, J. B. Popkin demised to J. Morris the said lands of Yuis Howell, the Copper House lands, and so much of Tyr Arnalt as lay within the fee of Trewyddfa, for the term of sixty-five years. Subsequently, the possession of all the above land, except Tyr Arnalt, was enjoyed by the firm of Lockwood, Morris, & Co. Shortly after the granting of the lease, Messrs. Lockwood, Morris, & Co. erected copper-smelting works, partly on the enclosed lands demised, and made a canal through Yuis Howell and the Copper House lands. In 1793, the Swansea Canal Company was founded, for the purpose of making a canal, which was intended to pass through the fee of Trewyddfa and in part through Yuis Howell and the Copper House lands and Tyr Arnalt, which were then occupied by them under the above-mentioned lease. The bill afterwards passed into a law, and became the Swansea Canal Act, 34 Geo. 3, c. 109. J. B. Popkins was named in sect. 1 of the act, and also in sect. 115. By indenture of 9th of August, 1797, between the then Duke of Beaufort, of the one part, and Lockwood, Morris, & Co. of the other part, it was agreed that the canal so made by the latter should be widened and extended, and that the said Duke of Beaufort and Lockwood, Morris, & Co. should be jointly interested in maintaining a canal through the fee of Trewyddfa. The Swansea Canal was completed in 1797. The private canal so made as aforesaid by Lockwood, Morris, & Co. was, under the above agreement, extended through the Copper House lands, Yuis Howell, and Tyr Arnalt, to the boundaries of the fee of Trewyddfa, where it joins and forms a continuation of the Swansea Canal. This extension of the canal comprised three acres, two roods, and twelve perches of the enclosed lands demised by J. B. Popkin to J. Morris in 1779, as before mentioned, and constituted the lands sought to be recovered in this action. The powers for making that portion of the canal which passes through the fee of Trewyddfa were obtained by the Duke of Beaufort and Messrs. Lockwood & Co., and with that and other modifications the bill passed into a law. The lands and premises sought to be recovered were included in the maps and

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books of reference, and were part of the lands authorized by the act to be taken by the said Duke of Beaufort for making the said canal in the fee of Trewyddfa. No payment or other satisfaction was made or agreed to be made to the owners of the land taken for the canal. But every thing that was done by the said Duke of Beaufort, as above stated, was done with the full *consent and approbation* and in accordance with the wishes of such owners and proprietors. The defendant, in 1835, became the assignee of the above-mentioned Duke of Beaufort. Since 1797, the public have had the use of the Trewyddfa Canal, as part of the Swansea Canal, for general traffic. In the year 1800, one John Calland was let into possession as purchaser of the Copper House lands, Yuis Howell and Tyr Arnalt, and into the receipt of the rents and profits thereof. The interest in the above lands and premises became vested in the lessors of the plaintiff.

The special verdict then submitted to the court, in the usual form, the question whether the defendant was guilty or not guilty.

Bramwell, for the lessors of the plaintiff. The plaintiffs are the reversioners seized in fee of this copyhold estate, and at the expiration of the lease from Popkins to Morris are entitled to recover an ejectment. (He was then stopped by the court.)

J. Brown, contra. The plaintiffs have no title to the possession of this canal, but were bound to seek their remedy by compensation under the act of Parliament. First, the Duke of Beaufort having entered on the land in question, and having made the statutory canal in 1797 by consent of the proprietors of the land, the estate in that land by virtue of the 47th section vested in the duke forthwith, without any conveyance, and turned the owners over to a mere right of compensation. Secondly, even if the estate did not vest, the plaintiffs ought not to bring ejectment until the present defendant, as assignee of his father, has failed in making compensation.

[*Parke*, B. What right has the defendant to keep this land?]

Dimes v. The Grand Junction Railway Company, 9 Q. B. Rep. 469; s. c. 16 Law J. Rep. (N. S.) Q. B. 107, is in point. The 47th section says, on payment or giving security for the payment of an annual rent for the purchase of the lands, or before such payment, &c., by leave of the owners or occupiers, the canal company may enter upon such lands.

[*Pollock*, C. B. That does not mean "consent" irrespective of payment or tender.

Parke, B. Where is there a new estate at will, created at the expiration of the lease of 1797? The owner of the fee does not say the defendant shall occupy the land with his consent.]

The act of Parliament says, that if the owner of land lets parties into possession, he shall not turn them out of it.

[*Pollock*, C. B. The special verdict does not find leave and license for the defendant to occupy the land.]

No; but what took place was equivalent thereto.

[*Martin*, B. Suppose the reversioner says to the defendant, Make a canal on my land; how does that deprive the reversioner of the right to enter on the expiration of the lease?]

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The estate vested in the defendant as soon as he entered with the leave of the owner. *Doe d. Armistead v. The North Staffordshire Railway Company*, ante, Q. B. 249.

[*Pollock, C. B.* How can a reversioner create an interest *in futuro* except by deed?

Parke, B. Has the defendant any estate or interest in the lands? There is no evidence of any agreement by the reversioner to create an estate at will.]

Bramwell was not called on to reply.

POLLOCK, C. B. The plaintiffs are entitled to judgment. It is admitted in argument that the plaintiffs have a good title, unless the act of Parliament has altered their situation. The defendant contends that the plaintiffs are precluded from recovering by reason of the owners and proprietors having consented to and approved of what was done. The question, however, does not turn on their approbation. But how can the reversioner be bound by a consent that the defendant should be at liberty to make some arrangement with the lessees? At the expiration of the lease, the plaintiffs were entitled to bring ejectment for the recovery of their lands.

PARKE, B. I am of the same opinion. This is the simple case of a defendant being in the possession of land with the consent of the tenant for the term after the expiration of the term; in such a case the party is a trespasser, and may be ejected by the owner of the fee. Here the defendant became the purchaser of the term, and obtained possession of the property of another, with the liability of being ejected, unless he became tenant at will to the owner; but in this case there was no tenancy at will. The question then is, whether what has passed has compelled the plaintiffs to seek their remedy under the act of Parliament, and to compel the defendant to buy their interest in the land. The 47th section only applies to cases of contract or of assessment by a jury. If after a mere agreement the company endeavor to enter, they become trespassers; but if the owner of the land gives his consent, then the company would not become trespassers, but the owner must take his security on the contract of purchase. But the mere entry by the defendant on the lands of the plaintiffs, with permission, does not give him a title. In the present case, there was no evidence of an estate at will. The defendant was merely tenant at sufferance, and might be treated either as a trespasser or as a tenant at will.

PLATT, B., concurred.

MARTIN, B. I am of the same opinion. The Duke of Beaufort was entitled to buy this land. He agrees with the lessees, and gets permission from them to enter the land, the reversioner giving his consent. At the end of the lease, therefore, the reversioner is entitled to recover possession of the premises. It is clear that the property has not passed out of the reversioner at the expiration of the lease.

Judgment for the lessors of the plaintiff.

Montoya & others v. The London Assurance Company.

MONTOKA & others v. THE LONDON ASSURANCE COMPANY.¹

Easter Term, May 5 and 7, 1851.

Insurance — Perils of the Sea — Damage direct and consequential.

A ship loaded with hides and tobacco whilst on her voyage encountered bad weather and shipped much sea water, whereby the hides were wetted and rendered putrid. Neither the tobacco nor the packages containing it were immediately in contact with nor directly damaged by sea water; but the tobacco was damaged and deteriorated in flavor by the fetid odor proceeding from the putrid hides:—

Held, that this was a loss by peril of the sea.

COVENANT on two policies of insurance.

The declaration stated an average loss on tobacco by perils of the sea. The defendants pleaded (by statute) that they had not broken their covenant; and issue having been joined thereon, the following case was, by a judge's order, stated for the opinion of this court:—

The plaintiffs, who are London merchants, effected certain policies of assurance on tobacco from New Granada to ports of discharge in the United Kingdom, and engaged to pay averages on the same. The ship being loaded with tobacco, and having sailed from New Granada, whilst on the voyage encountered much bad weather, was struck by heavy seas, and shipped large quantities of water, by reason whereof the produce so shipped sustained damage as hereinafter mentioned. On the arrival of the vessel in April, 1849, some part of the cargo was considerably damaged from the causes above mentioned, and on opening the hold a suffocating stench and vapor or gas issued from it. The cargo had consisted principally of sugar, hides, and tobacco. On examination, it appeared that a large quantity of the hides was in a state of absolute rottenness and putridity from sea damage, and a great number of the serons or dry hides in which the tobacco was packed was also wetted and greatly damaged by sea water. Part of the cargo of tobacco was rendered totally worthless. The rest was greatly deteriorated in consequence of a part of the cargo having been excessively damaged by sea water, which caused fermentation and strongly impregnated more or less the whole of the cargo with a fetid flavor. The plaintiffs claimed in this action in respect only of the damage sustained by the tobacco, which was not, nor were the serons or packages containing the same immediately in contact with nor directly damaged by sea water, but the tobacco was damaged and deteriorated in flavor only, and not otherwise, by the fetid odor caused by and proceeding from the fermentation and putridity of that part of the cargo which had been directly damaged and putrified by sea water shipped as above mentioned.

The question for the opinion of the court was, whether the defendants were liable for the damage aforesaid, and judgment was to be entered accordingly either for the plaintiffs or the defendants.

¹ 20 Law J. Rep. (N. S.) Exch. 254.

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Sir F. Thesiger, (*Tomlinson* with him,) for the plaintiffs. The underwriters are liable for the damage done to the tobacco. The question turns on the application of the legal principle to be found in Lord Bacon's *Maxims*, p. 1, "In jure non remota causa sed proxima spectatur;" and the point for consideration is, What circumstance is to be considered as the cause of the loss? The plaintiffs contend that the damage must be considered to have happened from perils of the sea; and where that is the cause it is immaterial whether the cause is mediate or immediate. If the lower cargo had been wetted by sea water, and the steam arising therefrom had become condensed and had fallen on the tobacco, that would be a loss by perils of the sea. So, if the lower cargo being wetted by sea water, noxious gases are generated which injure the cargo above, is not that the case of a loss produced by perils of the sea? *Green v. Elmslie*, Peake, N. P. 212; *Livie v. Janson*, 12 East, 648; and *Tatham v. Hodgson*, 6 Term Rep. 656, were cases of losses arising from causes too remote to be within the terms of the policy as to perils of the sea. *Hahn v. Corbett*, 2 Bing. 205; s. c. 3 Law J. Rep. C. P. 253; *De Vaux v. Salvador*, 4 Ad. & E. 420; s. c. 5 Law J. Rep. (N. S.) K. B. 134; and *Cullen v. Butler*, 5 M. & S. 461, are also in point. There are other cases in which losses by perils of the sea have been held to take place where the sea does not act on the cargo directly, but only indirectly; such are *Lawrence v. Aberdeen*, 5 B. & Ald. 107; and *Gabay v. Lloyd*, 3 B. & C. 793; s. c. 3 Law J. Rep. K. B. 116. The subject has been well treated by the American writers. The law on the subject is thus stated in 1 Phillips on Insurance, p. 638, ed. 1840: "It has been held, that the destruction of the vessel's bottom by worms is not a peril of the sea. A case came before Lord Kenyon relating to a vessel so destroyed on the coast of Africa. A special jury were of opinion 'that this was not a loss within the term of perils of the sea in policies of insurance; and Lord Kenyon was of this opinion.' Livingston, J., alluding to this case, said, 'I do not mean to be understood as subscribing to the opinion of Lord Kenyon.' But his opinion has been adopted in Massachusetts. A ship's bottom was injured by worms during the time of her detention by an embargo at Cape St. François. In respect to a claim for indemnity against the insurers for the damage, the court, speaking of the case of *Rohl v. Parr*, said, 'It was decided upon the ground that the loss was like the wearing and natural decay of the vessel.'" The subject is also discussed in 3 Kent's Com. p. 308, note a, 4th ed. He also cited *Hazard v. The New England Marine Insurance Company*, 1 Sumner's Rep. (American,) 218.

Peacock, for the defendants. It must be conceded, on the part of the defendants, that the principle of *non remota causa sed proxima spectatur* applies to this case. *Green v. Elmslie* is in favor of the defendants. There the ship was driven by stress of weather on the enemy's coast and captured; and it was contended that the loss was occasioned by perils of the sea; but Lord Kenyon there said, "This was clearly a loss by capture, for had the ship been on any other coast

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but that of an enemy's, she would have been in perfect safety." In the present case the effluvium which caused the damage was the mediate and not the immediate cause of the loss. Suppose a noxious smell arising from the hold of the vessel had caused disease and death in a cargo of cattle or of slaves, during the time that the latter were legitimate objects of traffic, would that have been the case of a loss by perils of the sea? Take the case of hay wetted by sea water, the result of which is spontaneous combustion; the underwriters would not be liable for a loss by perils of the sea. In *Lockyer v. Offley*, 1 Term Rep. 260, Willes, J., in delivering the judgment of the court, says, "It would be a dangerous doctrine to lay down that the insurer should in all cases be liable to remote consequential damages. That has been compared to a death's wound received during the voyage, which subjected the ship to a subsequent loss. To this point the case of *Meretony v. Dunlope*, E., 23 Geo. 3, seems very material. That was an insurance on a ship for six months, and three days before the expiration of the time she received her death's wound, but by pumping was kept afloat until three days after the time; there the verdict was given for the insurer, which was confirmed by the court." Suppose a jar containing prussic acid happens to break, whereby a cargo of cattle are poisoned, it cannot be contended that the underwriter would be liable as for a loss by perils of the sea. The principle on which the decision in *Logan v. Hall*, 4 Com. B. Rep. 598; s. c. 16 Law J. Rep. (n. s.) C. P. 252, proceeded, applies to this case. On an insurance of slaves against the perils of the sea, their death by failure of sufficient and suitable provision, occasioned by extraordinary delay in the voyage from bad weather, was not a loss within the policy. *Tatham v. Hodgson*. In *Powell v. Gudgeon*, 6 M. & S. 431, a ship, being disabled by perils of the sea, put into port to repair, the expenses of which were defrayed by the master out of the sale of part of the cargo; it was held, that the loss of such cargo was not a loss by perils of the sea. In *Jones v. Schmoll*, 1 Term Rep. 130, *n*, it was decided that the underwriters were not answerable for the loss of such slaves as died by despair or fasting in consequence of the failure of a mutiny. He also referred to *Gregson v. Gilbert*, 3 Dougl. 232.

Tomlinson (Sir F. Thesiger was absent) was not called on to reply.

POLLOCK, C. B. I think the plaintiffs are entitled to the judgment of the court. The case has been argued very ingeniously for the defendants, and has raised some doubts as to where we ought to fix the limits of the responsibility of the underwriters, and without doubt many such cases may be suggested. But in the present case there is no difficulty whatever. If an underwriter is to be held responsible for the damage done to a whole cargo of corn, part of which is spoiled directly by sea water and the remainder by the fermentation arising from the lower portion, the underwriters must be held liable here. In the present case it is difficult to say that the damage is not

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the immediate result of perils of the sea. Some of the cases put to us as cases of consequential damage are, in my opinion, cases of immediate damage. Where, indeed, the sea water does injury to part of the cargo directly, and consequentially other parts are injured, it cannot be laid down generally that the damage is done directly. But I think it may almost be laid down that where mischief arises by perils of the sea, and the natural consequence of that is to produce further mischief, the underwriters are liable for such further mischief.

PARKE, B. No doubt the rule of Lord Bacon is the correct one, and applies to all cases of damage, that *non remota causa sed proxima spectatur*; and the question is, What is *causa proxima*, and what *remota*? Undoubtedly, it is difficult in the abstract to lay down any rule. But I agree with the lord chief baron that although it may be difficult to draw the line, it is not so difficult to say whether each particular case falls within it. The present case does fall within the line. The owner of the tobacco would be entitled to recover compensation for the injury from the owner of the vessel or the master; and assuming that to be so, it is difficult to say that he could not also recover for it against the underwriter as for a peril of the sea. Now, suppose the cargo had consisted wholly of hides, and the lower layers being wetted by the sea water, putrid vapors had arisen from them and affected the upper layers, in such a case the owner of the hides could recover in respect of the damage to the upper layer. How, then, can it make any difference that the layers consist of different articles instead of hides alone? Here the damage to the tobacco is to be considered as immediately and directly caused by perils of the sea. I give no opinion upon the cases put by the defendants' counsel; some of them are within and some of them without the line. But in the present case there is no difficulty. It is the same as if the cargo consisted wholly of tobacco, the lower portion had become wetted, and the moisture, extending upwards by capillary attraction, had produced vapors which had damaged the upper part. The assured are entitled to recover.

PLATT, B. The case I put to the defendants' counsel during the argument tested the strength of his reasoning. Suppose corn to be shipped at Odessa, and that before its arrival in port it is damaged by sea water. It might be landed and dried, but instead of that it is taken on to the end of the voyage, and the whole becomes bad. That is surely a total loss by perils of the sea. The defendants' counsel asks, When did the loss occur? I think that is a matter of no moment. The sea water having produced the fermentation of the hides, and thereby caused the injury to the tobacco, the under part of the cargo is wetted, and then the vapor arising therefrom destroys the quality and value of the upper portion, and that constitutes a total loss. It is a mere playing with terms to say that this is not the case of damage occasioned by a proximate cause. Fermentation is not the proximate cause of the loss, but the water which has been

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shipped in consequence of the bad weather is the proximate cause. The damage is the result of the shipping of the water, and the loss is directly occasioned by perils of the sea.

MARTIN, B. The loss in this case must be considered to arise from a peril of the sea. The case states that part of the cargo was damaged by sea water, and the injury done to the rest by that circumstance is correctly treated as arising from perils of the sea within the meaning of the policy. The sea water cannot be removed, and by its contact with the hides occasions the damage. Although it may be difficult to draw a positive line, it is enough in this case to say that the injury here is a direct and not a remote consequence of what took place.

Judgment for the plaintiffs.

WALTHEW v. CROFTS.¹

Hilary Term, January 15, 1851.

*Church — Charging Benefice — 13 Eliz. c. 20 — Sequestrator —
12 & 13 Vict. c. 67.*

To an action by a sequestrator of the living of S. upon a covenant to pay the yearly rent of 980*l.*, contained in a lease of the rectory and tithes (with certain exceptions) of the living of S. granted by the rector of S. to the defendant before the sequestration, the defendant pleaded, seventhly, that the rector being indebted to V. and M. in large sums of money, and requiring time to pay the said debts, V. and M., at the request of the rector, consented to give time, and V. consented to advance him a further sum upon condition of the said lease being granted to the defendant, and of another deed being executed by which the rector appointed the defendant receiver of all the tithes, &c., demised by the said lease, and authorizing him, after deduction of a percentage, to pay therefrom the debts of V. and M., and to keep up certain policies of insurance for the benefit of V. and M., and also certain other policies, and to carry out other purposes connected with the arrangement. The plea alleged that the lease was executed as part of the same transaction, and that the rector knew at the time of the deeds being executed that the defendant was attorney and agent for V., and that the second deed was made to enable him to apply the rent reserved by the first deed in the manner above mentioned; that there was due from the rector to V. and M. more than was claimed in the action, and that he, the defendant, had applied the tithes, &c., received by him, as directed by the second deed.

The defendant pleaded, eighthly, that before the execution of the lease the rector of S. was indebted to V. and M. and others, and that in consideration thereof and of a further advance by V., the rector agreed to charge the living of S. by executing the lease declared on, and by appointing the defendant agent and receiver by the deed set out in the seventh plea; and that the lease was part of the same transaction to charge the living:—

Held, that the seventh plea did not show any defeasance of the covenant to pay the rent contained in the lease: but also, *held*, that there was an equitable assignment of the rent so far as necessary to pay V. and M., and that therefore the lease was void as being part of a transaction by which the living was charged, contrary to the provisions of the 13 Eliz. c. 20; and that both the seventh and eighth pleas were good.

DEBT, under the provisions of 12 & 13 Vict. c. 67, by the plaintiff, as sequestrator appointed by the Bishop of Lichfield to collect the rents and profits of the rectory and parish church of Swinnerton, in the county of Stafford.

The first count of the declaration stated the recovery of a judgment by George Smallwood against Christopher Dodsley, the rector of Swinnerton, the issuing of a *testatum fi. fa.* thereon into the county of Stafford, and a return of *nulla bona*; that thereupon a writ of *sequestrari facias* was sued out directed to the said bishop; that the plaintiff was appointed as sequestrator to sue for and recover and receive the rents, tithes, fruits, issues and profits of the rectory, to the end that the charges of serving the cure might be paid by the plaintiff, and the residue rendered to George Smallwood according to the terms of the writ; and that the said sequestration was duly published. It then stated that Christopher Dodsley continued to be the rector, and that before the sequestration, and whilst he was rector, by deed, dated the 17th of June, 1845, he demised the rectory and parsonage to the defendant, with the tithes, &c., except the parsonage-house and buildings, and the tithes payable by the occupiers thereof, and except the glebe lands and Easter dues and surplice fees, for fourteen years, if he, Christopher Dodsley, should so long live, yielding and paying to him the yearly rent of 980*l.* on the first of March, and deducting the taxes. It then stated that the defendant entered into and enjoyed the demised premises, and alleged that 1960*l.*, two years' rent, was due on the 1st of March, 1849, after the plaintiff was appointed sequestrator, whereby an action had accrued, &c.

The defendant pleaded, seventhly, that before the making of the said deed, and while Christopher Dodsley was rector, and before the sequestration, he, Christopher Dodsley, was indebted to one Viner in the sum of 985*l.*, and to one Mortimer in the sum of 1500*l.*, and that he required them to give time for the payment of the said debts, and also Viner to advance 1494*l.*; that they consented to do so, and Viner lent the money upon the terms that the said Christopher Dodsley should execute the indenture, named in the declaration made between them, and also another indenture for the purpose of authorizing the defendant to apply the rent in the declaration mentioned, as the agent and for the benefit of Viner and Mortimer, and for the security of the said debts, and that Dodsley executed the two indentures. The second indenture was then set out. It was made between the defendant of the one part and Christopher Dodsley of the other part; and after reciting the demise to the defendant of the tithes, rents, profits, and commodities of the rectory, except the parsonage and tithes of the parsonage, and certain fees, and also reciting that, by deed of even date, Christopher Dodsley had appointed the defendant his receiver, agent, and attorney, to collect the tithes, rents, issues, and profits, except as in the said lease excepted, of and from all the tithe payers of the parish, and other persons liable to pay, with authority to the defendant to receive 1*s.* in the pound as a percentage for his trouble, and to apply the surplus of the tithes, rents, issues, and profits as he, Christopher Dodsley, should direct, it witnessed that Christopher Dodsley covenanted with the defendant and directed that the surplus tithes, rents, issues, and profits should be applied to pay the taxes and the parish rates and the stipend of the curate for the time being; secondly, to pay the premium upon two

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policies of insurance on the life of Christopher Dodsley; thirdly, to pay Viner the interest of his debt of 2475*l.*; fourthly, to pay the rector for the cure of the church, 150*l.* per annum; fifthly, to pay the premium on another policy on Christopher Dodsley's life; sixthly, to pay Mortimer 400*l.* per annum towards his debt; seventhly, to pay two other premiums on other life insurances; eighthly, to pay certain arrears of an annuity; ninthly, to pay the balance to Mortimer until his debt was paid off; tenthly, to pay a certain annuity, becoming due after Mortimer's debt was paid off; eleventhly, to apply the balance towards paying the debt due to Viner; twelfthly, to pay the arrears of an annuity, and then to pay the balance to Christopher Dodsley; and it was agreed between the parties that the payments should be made in the above order. The plea then stated that the lease was executed as part of the same transaction, and that, at the time of making the lease and indenture, Christopher Dodsley well knew that the defendant was then the attorney and agent of Viner, and that the indenture was made with the defendant as such agent and attorney, and to enable him to apply the rent reserved by the deed in the declaration mentioned in the manner above stated. The plea then averred that before and at the time of the issuing of the said sequestration and of the publication thereof, and also at the time of the commencement of the suit, there were due from the said Christopher Dodsley to the said Viner and Mortimer, respectively, divers moneys exceeding the moneys and damages in the first count mentioned, and also all rent that ever became due or payable upon or by reason of the indenture in the first count mentioned, to wit, &c., in respect of the said debts so due and owing from the said Christopher Dodsley, and for the security and payment whereof the said indenture in the declaration mentioned and also in the said declaration above set forth were entered into and made, and that the defendant retained, paid, and applied the moneys in the first count alleged to have become due for the rent therein mentioned, in all respects according to the provisions of the said indenture above set forth in making the payments therein authorized and directed. Verification.

The defendant pleaded eighthly, that before the sequestration and before the making of the demise in the declaration mentioned, the said Christopher Dodsley was indebted to Viner and Mortimer and divers others in a large sum, to wit, 5000*l.*, and being so indebted, and in consideration of a further sum, to wit, &c., to be paid and advanced and lent, and then paid, advanced and lent to him by the said Viner, and of the said defendant then consenting to become and be the agent of and for the benefit of the said Viner, as hereinafter mentioned, did, after the making of and contrary to the form of the stat. 13 Eliz. c. 20, being an act touching leases of benefices and other ecclesiastical livings with cure, to wit, &c., agree with the defendant and the said Viner, that he, the said Christopher Dodsley, should charge the said ecclesiastical benefice of the rectory of Swinerton, the same being a benefice with cure of souls within the meaning of the said statute, with the payment of the said last-mentioned sum and of certain other sums, to wit, the sums specified

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in the indenture in the seventh plea set forth, by making to the defendant, as the agent and for the benefit of the said Viner, the indenture of lease of the said premises in the said first count mentioned, for the term and at the rent therein mentioned, and by appointing the defendant the receiver of the tithes, rents, issues, and profits, and all commodities and emoluments whatsoever, (except as therein excepted,) of or belonging to the said rectory by the indenture secondly hereinafter set forth, and by executing the indenture in the said seventh plea set forth for the purpose of authorizing and enabling the defendant to retain and apply, and in order that he should retain and apply, the rent reserved by the indenture in the first count mentioned, and all profits and proceeds of the matters and things thereby demised in payment of the said moneys which were so due and owing to the said Viner and Mortimer respectively, and so to be charged upon the said benefice and of the said other moneys so also to be charged upon the said benefice as aforesaid, and not otherwise. It then averred the advance of the money to the said Christopher Dodsley by the said Viner, and that the said Christopher Dodsley did then, in pursuance of the said agreement and in order to charge his said benefice with payment of the said moneys within the meaning of the said statute, to wit, &c., aforesaid, also execute the indenture in the first count mentioned, (setting it out at length.) It then averred, that in pursuance of the said agreement, and as part of the same transaction, and in order to charge the said benefice, the said Christopher Dodsley executed an indenture appointing the defendant receiver of all the tithes and all rent charges or sums of money which might thereafter become payable in lieu of and upon a commutation for such tithes, rents, issues, and profits, and all commodities and emoluments whatsoever, (except Easter dues and offerings, surplice and burial fees, of or belonging to the rectory or parsonage of Swinerton aforesaid,) and except so much of the said rectory as consisted of the parsonage-house, and other the houses, edifices, and buildings, and the gardens and orchards attached or belonging thereto, and the appurtenances necessary for the convenient occupation of the same, and also except the glebe lands to the said rectory belonging, with a commission of 1s. in the pound, (setting out the deed at length.)

Averment, that in pursuance of the said agreement and intent to charge the benefice, the deed set out in the seventh plea was executed, and that save for the purposes in the said last-mentioned indenture stated, and in pursuance of the said agreement for charging the said benefice, the defendant never had received any moneys with benefit, profit, or advantage thereunder. Verification.

Special demurrers and joinders.

Bramwell, in support of the demurrers.¹ The effect of the lease declared on is, that the defendant is bound to pay the amount of the rent thereby reserved, unless he can show a release or defeasance

¹ November 15, 1850, before POLLOCK, C. B., PARKE, ALDERSON, and PLATT, BB.

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by deed. If the arrangement set out in the seventh plea amounted to a defeasance of the covenant, then it should have been so pleaded. The rent being, therefore, due upon the covenant, the sequestrator is not excluded from his right to sue for it by the second deed. The object of the deed is immaterial if the legal effect is not to give an indefeasible authority to the defendant to apply the rents sued for, in another way. In terms, the authority is to apply the tithes, and not the rent. The plea does not show how the moneys received have been applied, and this is an objection raised by the special demurrer. Some of the objects contemplated would be voluntary payments, and the sequestrator would be entitled to revoke the authority, such as the payments to keep up the policies of insurance, which were not securities for the debts to Viner and Mortimer. The second deed is illegal under 13 Eliz. c. 20,¹ and the first deed stands unaffected by the provisions of the second. The eighth plea is also bad, because the covenant to pay the rent is not avoided, although there may be other illegal provisions for charging the benefice. *Sloane v. Packman*, 11 Mee. & W. 770; s. c. 12 Law J. Rep. (N. S.) Exch. 423.

Willes, in support of the pleas. Under the 12 & 13 Vict. c. 67, s. 1, the sequestrator is not to bring any action (except against the incumbent himself) which might not lawfully have been brought by the incumbent himself had there been no sequestration. Taking both the deeds together as pleaded, the transaction was an illegal charge upon the benefice. The tithes are, in fact, to be applied to the payment of the debts, and the complexity of the arrangement will not enable the parties to evade the statute. *Bowyer v. Pritchard*, 11 Price, 103. *Alchin v. Hopkins*, 1 Bing. N. C. 99; s. c. 3 Law J. Rep. (N. S.) C. P. 272. But if the transaction was legal, then there was a valid appropriation of the moneys received by the defendant, and the sequestrator cannot repudiate what the incumbent had previously authorized. It cannot be said that the covenant to pay is to be enforced against the defendant, and yet he is to lose the moneys which he has paid over pursuant to the arrangement under which the deeds were executed.

Bramwell replied.

Cur. adv. vult.

Judgment was now delivered by

PARKE, B. His lordship, having stated the pleadings, said: The seventh plea, therefore, in substance, is this: that the defendant was lessee of the living by a separate deed, apart from the lease of the tithes, and it was arranged that the rent, which would otherwise

¹ The 13 Eliz. c. 20, enacts, "That all chargings of such benefices with cure hereafter with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this act, shall be utterly void."

This statute is still in force. See 43 Geo. 3, c. 84, 57 Geo. 3, c. 99, 1 & 2 Vict. c. 106.

accrue to the rector, should be applied in the manner provided for by the deed, in paying his debts and making certain provisions for paying the premiums on the policies of insurance on his life, and for other purposes connected with the arrangement. To this plea three objections were urged: first, that the rent reserved in the lease was payable by virtue of the covenant, unless there was a defeasance under seal to the payment of the rent. Secondly, the rent being payable under the lease, there was no indefeasible appropriation of it before the sequestration, and, therefore, the sequestrator had a right to sue; and, thirdly, if there was such indefeasible appropriation it was void under the 13 Eliz. c. 20, and the 57 Geo. 3, c. 99. As to the first objection, we think that the seventh plea does not state any defeasance of the covenant to pay the rent by an instrument under seal. The second objection was resolved into two: first, that the plea does not state such an appropriation of the rent sued for as would bind the sequestrator, for that the indenture directing the mode of payment does not refer to the rent payable under this lease and direct the appropriation thereof; and next, that there is no irrevocable appropriation of it. It is properly contended, and one of the grounds of special demurrer is, that the averment in the plea that this indenture was executed for the purpose of authorizing the defendant to apply the rents reserved in the lease, cannot be taken into consideration in considering whether the deed operates on this rent, because it must be determined by the language of the deed itself. We should not have much difficulty in deciding that the deed did so operate from considering its terms and the recitals in it; but should have thought there was no irrevocable appropriation or equitable assignment of the whole of the rent, (if indeed there could be any against the sequestrator, who acts merely as trustee for the creditor, and sues for money due, under the 12 & 13 Vict. c. 67,) which would bind the sequestrator, even if it were competent for the incumbent to make any appropriation of the profits of the living. Upon this supposition, the appropriation, in the order provided for by the indenture, of so much of the rent as might be necessary to pay Viner and Mortimer their debts and the interest upon them, may be an authority coupled with an interest for a valuable consideration given by those two creditors, so that to that extent, therefore, it may be an equitable assignment or valid appointment of so much as may be necessary to pay those debts; but so far as relates to the payment of taxes and poor rates, at all events, payment of the premiums on the policies of insurance, or connected with those debts which take precedence in their order, there appears nothing to make the order irrevocable, for there is no valuable consideration for that part of the appropriation, and the plea would be bad, inasmuch as to the extent of the rents sufficient to satisfy these demands it does not give a valid answer to the action, and being bad on this part it would be bad altogether. These points, however, are neither of them material to be decided, for the plea is good on another ground. The third objection was, that this equitable assignment of the rent was a charge on the living, and void under the stat. 13 Eliz. c. 20; but if so, the lease

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itself, which is averred to have been executed as part of the security for the debt, is also void, and the plea contains a good answer to the action on that ground. And it is to be observed that the plea is not demurred to specially on the ground of duplicity. A similar objection to the last was made to the eighth plea. The lease is averred to have been part of the machinery for charging the living with the debts and money advanced to the incumbent, and is the only instrument directly charging the benefice. We must assume that if the object had not been to charge the living with the debt, the lease would not have been executed; and that it was made to enable the defendant to recover from the tithe payers and pay over a stipulated sum as the rent to the creditors, who thereby obtained the security of the living. It was the intention of the act 13 Eliz. c. 20, to avoid all charging of benefices other than rents, to be reserved in permitted leases; which rents were meant to be enjoyed by the incumbents themselves, and not, by corrupt and indirect means, to be transferred to other uses. On those grounds we think the lease is void, and, consequently, the eighth plea is also good; and, therefore, there will be judgment for the defendant.

Judgment for the defendant.

WILES v. WOODWARD.¹

Trinity Vacation, July 8, 1850.

Deed — Estoppel — Trover.

The plaintiff and the defendant had been in partnership together as paper makers and iron merchants, and in the deed of dissolution it was recited that an agreement had been made that the defendant should have all the stock in trade in the business of paper makers, but the plaintiff should receive paper out of that stock to the value of 898*l.* 4*s.* 11*d.* which was to remain in the paper mill for a year, and that the plaintiff was to have all the stock in trade in the iron business. The deed also recited, that in pursuance of that arrangement paper of that value had been delivered to the plaintiff and the same then was in the paper mill as the plaintiff acknowledged; and then followed an assignment by the defendant to the plaintiff of all the stock in trade in the iron business, and by the plaintiff to the defendant of all the stock in trade in the paper-making business, "except the 898*l.* 4*s.* 11*d.* worth of paper so delivered to the plaintiff as aforesaid." No actual delivery or separation of this portion of the paper took place; but there was evidence of a conversion of the whole by the defendant:—

Held, that the defendant was estopped from saying that there was no delivery to the plaintiff; and that there having been a conversion of the whole, the deed showed that the plaintiff had sufficient possession to support an action of trover.

TROVER for a quantity of paper.

Pleas — Not guilty, and not possessed.

At the trial, before Patteson, J., at the York Summer assizes, 1849, it appeared that Joshua Woodward, the defendant, and one George Wiles, had been in partnership as iron merchants and paper

¹ The report of this case has been unavoidably delayed. 20 Law J. Rep. (N. S.) Exch. 261.

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manufacturers, and that George Wiles had, with the consent of Joshua Woodward, agreed to assign his share in the partnership to William Wiles, the plaintiff, but no express dissolution of partnership had taken place.

A deed, dated the 14th of February, 1844, between Joshua Woodward of the first part, George Wiles of the second part, and William Wiles of the third part, was put in, which recited the partnership between Joshua Woodward and George Wiles in the two businesses, the agreement for the assignment by George Wiles of his share in the two businesses to William Wiles, the plaintiff, dated the 1st of August, 1842; that no express dissolution had taken place in consequence of this agreement, but Joshua Woodward and William Wiles had, in fact, carried on the said businesses as partners, and George Wiles had retired. It then recited that Joshua Woodward and William Wiles had determined to dissolve their partnership in the said businesses; that the property of the partnership consisted (*inter alia*) of the stock in trade at the paper mills; that it had been agreed as part of the arrangement for the dissolution that the premises, stock in trade, and book debts of the paper-making business should belong to Joshua Woodward, and that the premises, stock in trade, book debts, &c., of the iron business should belong to William Wiles, but that, inasmuch as the property to be taken by Joshua Woodward on such dissolution exceeded in value the property to be taken by William Wiles, it was further agreed that William Wiles should receive out of the stock in trade of the said business of a paper manufacturer paper to the value of 898*l.* 4*s.* 11*d.*, which should remain upon the premises of the said mill for the term of one year or not, at the option of William Wiles, who should pay the excise duty thereon. It then recited that the paper mill was agreed to be assigned to Joshua Woodward, and the premises, &c., belonging to the iron business were to be assigned to William Wiles, and stated "that in further performance of the said arrangement, paper to the value of 898*l.* 4*s.* 11*d.* has been delivered to the said William Wiles, and the same is now in and upon the said mill and premises, as he doth hereby acknowledge." It then recited the consent of all parties to the dissolution of the partnership, and stated the dissolution in pursuance thereof, and an assignment unto Joshua Woodward "of all and singular the stock in trade, goods, fixtures, implements, and articles, of or belonging to, or used in the said trade or business of paper manufacturers heretofore carried on in copartnership by the said Joshua Woodward and William Wiles, other than and except the said sum of 898*l.* 4*s.* 11*d.* worth of paper so delivered to the said William Wiles as aforesaid." The deed, after other provisions as to the iron business, contained covenants between the parties, that the covenanting parties respectively should have, hold, receive, take, and enjoy the stock in trade, effects and premises, by the deed assigned or released without interruption or denial of the covenanting parties respectively. It appeared further that no paper had been actually separated from the rest or delivered to the plaintiff; but there was evidence of a conversion of the whole by a refusal of the defendant

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to deliver any, and a sale of a large portion. It was objected, on behalf of the defendant, that, under these circumstances, the plaintiff never had such possession as would support the action of trover. His lordship overruled the objection, and a verdict was found for the plaintiff, with leave reserved to the defendant to move to enter a nonsuit. A rule was accordingly obtained in Michaelmas term, 1849, against which

Martin and *T. Jones* showed cause.¹ The recitals of the deed and the operative parts estop the defendant from raising this objection. The paper of the value of 898*l.* 4*s.* 11*d.* must be taken to have been delivered to the plaintiff, and the rest is actually conveyed to the defendant. There was no joint tenancy in the paper, the value of which is sought to be recovered in this action; and after the deed was executed, and after the conversion of the whole, the plaintiff was entitled to maintain trover.

[*Parke*, B. The difficulty is that you cannot say which part of the paper was the plaintiff's.]

There was a sufficient appropriation effected as proved by the deed. In *Jackson v. Anderson*, 4 Taunt. 24, a similar question arose, where the plaintiff was entitled to a certain number of dollars out of a larger quantity, and the defendant was entitled to the rest. No separation was made; but the defendant disposed of the whole, and the court held, that trover would lie, and the value of those which belonged to the plaintiff might be recovered. The action is not brought for any matter collateral to the deed, and the recitals will operate, therefore, as conclusive proof of the truth of the facts. *Carpenter v. Buller*, 8 Mee. & W. 209; s. c. 10 Law J. Rep. (N. S.) Exch. 393. It falls within the principle laid down in *Freeman v. Cooke*, 2 Exch. Rep. 654; s. c. 18 Law J. Rep. (N. S.) Exch. 114. It is matter *in pais*, which could be taken advantage of without being pleaded. The plaintiff and the defendant agreed to act and did act upon the assumption that the paper had been delivered, and the omission to make a selection will not destroy the plaintiff's right of property. *Gillett v. Hill*, 2 Cr. & M. 530; s. c. 3 Law J. Rep. (N. S.) Exch. 145, is an authority in favor of the plaintiff. The defendant is precluded from objecting that the paper was not appropriated to the plaintiff.

Watson and *Pashley*, contra. The plaintiff cannot succeed, unless he had a separate and distinct property in the subject matter. Here the paper was the joint property of the plaintiff and the defendant as partners, and no separation of the paper ever took place. Suppose the paper had been destroyed by fire, upon whom would the loss have fallen? Is the recital in the deed to prevail against the fact? The recital as to the paper is a collateral matter, and is not to be deemed an estoppel. *Carpenter v. Buller*. It amounted only to a contract to deliver the paper at a future time, and no property passed by the execution of the deed. *Laidler v. Burlinson*, 2 Mee. & W. 602; s. c.

¹ Feb. 8, before PARKE, ALDERSON, ROLFE, and PLATT, BB.

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6 Law J. Rep. (N. S.) Exch. 160. *Wait v. Baker*, 2 Exch. Rep. 1; s. c. 17 Law J. Rep. (N. S.) Exch. 307. Even if the recital could be considered an estoppel, it should have been replied, and the plaintiff having taken issue cannot now set up the estoppel. *Doe v. Huddart*, 2 Cr. M. & R. 316; s. c. 4 Law J. Rep. (N. S.) Exch. 316. *Doe v. Wright*, 9 Ad. & E. 763. *Vooght v. Winch*, 2 B. & Ald. 662; and *Doe v. Wellsman*, 2 Exch. Rep. 368; s. c. 18 Law J. Rep. (N. S.) Exch. 277.

[*Parke, B.*, referred to *Speake v. Richards*, Hob. 206.]

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B. This case has stood over for some time, and the principal question involved in it is one of some nicety. The plaintiff brought an action of trover for a quantity of paper. It appeared at the trial, before my brother Patteson, at York, that the plaintiff and the defendant had been in partnership together as paper makers and iron merchants; and that the partnership was dissolved by a deed of the 14th of February, A. D. 1844, by which it was recited that an agreement had been made that the defendant should have all the stock in trade in the business of paper merchants, but the plaintiff should receive paper out of that stock to the value of 898*l.* 4*s.* 11*d.*, which was to remain in the paper mill for a year. On the other hand, the plaintiff was to have all the stock in trade in the iron business. The deed further recited that, in pursuance of that arrangement, paper of that value had been delivered to the plaintiff, and the same then was in the paper mill, as the plaintiff acknowledged. The deed then contained an assignment by the defendant to the plaintiff of all the stock in trade in the iron business, and by the plaintiff to the defendant of all the stock in trade in the paper-making business, except the 898*l.* 4*s.* 11*d.* worth of paper delivered to the plaintiff, and a mutual release and dissolution of the old partnership. It also appeared on the trial, that, in fact, no paper whatever was set apart or actually delivered to the plaintiff. The counsel for the defendant on the trial contended, therefore, that the plaintiff could not maintain an action of trover, as no certain definite quantity of paper belonged to him; that as all the paper was assigned to the defendant by the plaintiff, except that delivered to the plaintiff, the whole was the defendant's, and, if not, that it was still the joint property of both; and therefore no action of trover could be maintained by the plaintiff, being one joint tenant, against the defendant, who was another. To this it was answered for the plaintiff, that both parties were estopped by the deed from saying that no such delivery had taken place to the plaintiff; and this not merely in an action on the deed, but in this proceeding, which it was said was to enforce rights arising out of the deed, and not collateral to it; and we think that this was the position of the parties. A recital, when it is of a fact agreed upon by both, binds both, as was held in the case of *Carpenter v. Buller* and *Stroughill v. Buck*, 19 Law J. Rep. (N. S.) Q. B. 209, which follows the authority

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of that case; and the present claim is not collateral to the deed, as was the case in *Carpenter v. Buller*. It is, therefore, an estoppel to both the parties to the agreement with respect to the stock in trade in the paper business, that they should stand precisely in the same situation as if the stock had been divided, and part, to the stipulated amount, delivered to the plaintiff; and being in that situation, the question is, what their respective rights are. If there had been a conversion of part only by the defendant, it would have been impossible, notwithstanding that agreement, to have said the particular portion mentioned in the declaration was set apart for the plaintiff, and the plaintiff could not have recovered. He would have been in the same position as if, after the paper had been already delivered, he had so confused it with the rest of the stock of paper as to make it impossible to ascertain it, and he could not have recovered for that portion. But if the whole of the paper is converted, the same difficulty does not arise, and therefore the part belonging to the plaintiff, whatever it is, must have been converted. Now, in the present case, we have before intimated our opinion there was evidence of a conversion by the defendant of the whole stock of paper, and the jury having found that conversion, we think the plaintiff is entitled to retain the verdict, and the rule must be discharged.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

[ERROR FROM THE COURT OF EXCHEQUER.]

CLEAVE v. JONES.¹

Easter Vacation, May 17, 1851.

Statute of Limitations — Acknowledgment of Payment —
9 Geo. 4, c. 14.

An acknowledgment of payment, in writing, although unsigned, is sufficient to take a debt out of the Statute of Limitations.

Semle, a verbal acknowledgment would also be sufficient.

To a declaration on a promissory note for 350*l.*, with interest, the defendant pleaded the Statute of Limitations. At the trial, the only evidence given by the plaintiff in support of this issue was the following unsigned entry in a book of the defendant, and in her handwriting: "1843. Cleave's int. on 350*l.* — 17*l.* 10*s.*." —

Held sufficient evidence of payment of interest to the plaintiff to take the case out of the Statute of Limitations.

Willis v. Newham, 3 Y. & J. 518, overruled.

In this case an action had been brought by the plaintiff upon a promissory note made by the defendant, dated the 2d of May, 1840, for the sum of 350*l.*, with interest, payable on demand. The de-

¹ 20 Law J. Rep. (n. s.) Exch. 238. 15 Jur. 515.

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defendant pleaded, amongst other pleas, the Statute of Limitations. The cause had been tried at Hereford, before Rolfe, B., at the Summer assizes, 1849, when the plaintiff, in order to show an acknowledgment of the debt within six years, gave in evidence an account book, containing the following unsigned entry in the handwriting of the defendant: "1843. Cleave's int. on 350*l.* — 17*l.* 10*s.*" It was contended by the plaintiff's counsel, that this entry was sufficient evidence to warrant the jury in finding a verdict in his favor on the issue joined upon the plea of the Statute of Limitations, if they were satisfied that the defendant had paid the sum of 17*l.* 10*s.* to the plaintiff as interest on the promissory note, the entry bearing date 1843, and the action having been commenced on the 30th of October, 1848. The learned judge, however, told the jury, that as the entry was not signed by the defendant, it was not sufficient evidence to justify them in finding the issue upon the Statute of Limitations in favor of the plaintiff, but that they were bound, in point of law, to find it for the defendant. To this ruling the plaintiff tendered a bill of exceptions, and assigned thereon, as error, that the judge declared his opinion to the jury that the said entry, not being signed by the defendant, was not sufficient evidence in law for them to find the said issue in favor of the plaintiff, but that they were bound in point of law to find that issue for the defendant, no further evidence in support thereof having been given by the plaintiff, and that therefore the defendant was entitled to a verdict; whereas the plaintiff's counsel contended that the said entry, although unsigned, was sufficient evidence in law for the jury to find that issue in favor of the plaintiff, nor were the jury bound in point of law to find that issue for the defendant, notwithstanding no further evidence had been given in support thereof by the plaintiff. It was now argued before Campbell, C. J., Patteson, Maule, Wightman, Cresswell, Erle, and Williams, JJ., by

Keating, (*Horn* with him,) for the plaintiff, in support of the bill of exceptions. The question is, whether by virtue of sect. 1 of stat. 9 Geo. 4, c. 14,¹ Lord Tenterden's Act, an entry in a ledger in the defendant's handwriting, but not signed by her, was a sufficient acknowledgment of the payment of interest, so as to take the case out

¹ The following are the material parts of the section referred to: "And whereas various questions have arisen, in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments; and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof: be it therefore enacted, that in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby: . . . provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever."

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of the Statute of Limitations, 21 Jac. 1, c. 16. The cases in which the statute requires the acknowledgment to be in writing, and signed by the party to be charged, are those of acknowledgments or promises *by words only*. In *Willis v. Newham*, 3 Y. & J. 518, it had been held, that a verbal acknowledgment of the payment of part of a debt within six years was not sufficient, under stat. 9 Geo. 4, c. 14, to take the case out of the Statute of Limitations, but that there must be evidence of an actual payment, or an acknowledgment signed by the party chargeable. That, however, was a very unsatisfactory decision, and the court were now called upon to review it. In *Waters v. Tompkins*, 2 C. M. & R. 723, it was held that the appropriation of a part payment, or of the payment of interest to a particular debt, might be shown by oral declarations. Great doubt had been thrown upon the decision in *Willis v. Newham* by subsequent cases. Thus, in *Bayley v. Ashton*, 12 Ad. & El. 493, Lord Denman, C. J., said, "If I were now, for the first time, called upon to put a construction upon this act, I should be of opinion that any proof of payment was sufficient. That was my first impression, but *Willis v. Newham* and *Waters v. Tompkins* have established a different doctrine; according to those cases, a written acknowledgment of payment, signed by the party, is necessary, and I am sorry to yield to their authority." Again, in *Magee v. O'Neil*, 7 M. & W. 531, Parke, B., said, "My feeling certainly is, that those decisions (*Willis v. Newham* and *Bayley v. Ashton*) have gone too far." There were no words in the statute to justify the construction put upon it in *Willis v. Newham*, and the court would now overrule that case. [He also cited *Hodsdon v. Harridge*, 2 W. Saund. 64 i, note c. *Bevan v. Gething*, 3 Q. B. 740. *Eastwood v. Saville*, 9 M. & W. 615. *Clark v. Alexander*, 8 Scott's N. R. 147. *Haydon v. Williams*, 7 Bing. 163. *Hooper v. Stephens*, 4 Ad. & El. 71.]

Greaves, (*Gray* with him,) contra. This case was clearly within the stat. 9 Geo. 4, c. 14; the 1st section relates to the mode of proof, and the proviso to the effect of the thing proved. This case was within the terms of the recital, and the proviso did not alter its effect, or the evidence necessary to establish the proof required by the clause. The act says, that if a debt be of more than six years' standing, it shall not be taken out of the Statute of Limitations by loose and vague conversation, but only by a written promise or acknowledgment signed by the party to be charged thereby. It is urged, however, that a subsequent part of the act contemplates a case like the present; but the proviso referred to leaves the case as the former part of the clause left it, and there is nothing in it to exempt this case from the general operation of the statute. It is not, that nothing therein contained shall alter the mode of proving the acknowledgment of payment, but that it shall not lessen the effect of any payment, which must mean, if such payment be properly proved. The whole enactment must be taken together. *Willis v. Newham* established the doctrine that a case like the present was within the mischief intended to be met by the statute, equally as much as the case of a

promise or acknowledgment, which would be unavailing unless in writing, and signed by the party.

[*Erle, J.* If part payment is proved by words only, is that an acknowledgment?]

No; that would not be sufficient; there must be a written document. *Willis v. Newham* had been confirmed by the cases of *Waters v. Tompkins*, and *Bayley v. Ashton*.

[*Maule, J.* If there were a written paper acknowledging a part payment, signed by the party to be charged, and it was afterwards shown that no payment was, in fact, made, would such a case be within the statute?]

No, it would not. In *Edan v. Dudfield*, 1 Q. B. 302, the court said, "It was indeed contended that parol evidence was inadmissible to explain the character of the acts relied on to prove acceptance, for that to admit it would let in all the inconvenience which the statute (the Statute of Frauds) was intended to prevent. No case, however, warrants the holding of the rule so strict, nor does convenience require it, for where there is the foundation of an act done to build upon, the admission of declarations to explain that act lets in only that unavoidable degree of uncertainty to which all transactions to be proved by ordinary parol evidence are liable." This was the same principle upon which the Court of Exchequer had put their construction of the 9 Geo. 4, c. 14, s. 1. This was a case within the intent and object of the act, and its requirements had not been complied with. [He also cited *Baildon v. Walton*, 1 Exch. 617. *Wainman v. Kynman*, Id. 118. *Lyde v. Barnard*, 1 M. & W. 101.]

Keating, in reply.

LORD CAMPBELL, C. J. I am of opinion that the time has come when *Willis v. Newham* must be overruled. The question upon this record is, whether, in an action upon a promissory note, an entry in the account book of the defendant, in her own handwriting, but not signed by her, that she has paid interest upon the promissory note within six years, be evidence to go to the jury to take the case out of the Statute of Limitations. It was held by the learned judge at the trial that it was not. We are to determine whether his ruling was right. If *Willis v. Newham* be well decided, the learned judge was fully justified in saying there was no evidence to go to the jury to take the case out of the statute. The learned judge held, that the defendant could not be charged, except by an acknowledgment in writing signed by her. Does the act say so or not? In my opinion, it says no such thing; and we must be careful not to extend the enactments of the statute. The act 9 Geo. 4, c. 14, in the preamble says, that questions have arisen, in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking the case out of the operation of the Statute of Limitations; and the statute is framed in order to prevent such questions afterwards arising. Before the passing of this act three modes of taking a case out of the operation of

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the Statute of Limitations were adopted. There was, first, an acknowledgment by words; secondly, a promise by words; and, thirdly, proving the payment of part of the principal or interest. We have to see whether this statute does not confine itself to the two first, leaving the third precisely as it was. The words are, "that in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." Does that lessen the effect of the payment of the principal or interest? I think it does not, because it is confined to promises or acknowledgments by words only. Then if the statute stated that alone, without any proviso, I think it would not have reached the case of payment of principal or interest; but to guard against all danger of such a construction being put upon it, we have the proviso, "that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." Does not that leave the proof of payment on account exactly as it was before the statute passed? It seems to me that the construction of the act of Parliament is plain. There is no case against which the plaintiff has to contend, except *Willis v. Newham*. If we say that case was improperly decided, we have then only to turn to the construction of the statute, and that, we think, is in favor of the plaintiff in error. The effect of our decision will be to let in verbal evidence of an acknowledgment of payment on account. The legislature must have supposed that more mischief would arise from excluding such evidence than from admitting it, otherwise it would have used words that would apply to that case, as well as to a mere promise or acknowledgment in words only. The judgment will therefore be for the plaintiff in error.

*Judgment accordingly.*¹

¹ The decision in *Willis v. Newham*, 3 *Younge v. Jervis*, 518, was disapproved in this country, in the late case of *Williams v. Gridley*, 9 Metcalf, 485, (1845,) and an oral admission of payment by the defendant was there held competent evidence to take a case out of the Statute of Limita-

tions of Massachusetts, the 13th section of which statute conforms substantially to the stat. 9 Geo. 4, c. 14, s. 1, upon which *Willis v. Newham* was decided. A similar decision was recently made in Maine, *Sibley v. Lumbert*, 30 Maine, 353, (1849.)

Hewitt v. Paterson.

HEWITT v. PATERSON.¹

Trinity Term, June 7, 1851.

13 & 14 Vict. c. 61 — *London Small Debts Act*, 10 & 11 Vict. c. 71 —
Costs — *Suggestion*.

Quære, whether the 13 & 14 Vict. c. 61, affects the *London Small Debts Act*, 10 & 11 Vict. c. 71; and consequently whether, in order to deprive a plaintiff of costs under the provisions of this latter statute, a suggestion for that purpose must be entered on the roll by the defendant.

THIS was a rule to enter a suggestion on the roll to deprive the plaintiff of costs under the 10 & 11 Vict. c. 71, (local and personal,) intituled "An Act for the more easy recovery of small debts within the city of London and the liberties thereof;" the plaintiff having obtained judgment for a sum not exceeding 20*l*. By the general County Court Act, 9 & 10 Vict. c. 95, personal actions for sums not exceeding 20*l*. are to be brought in the county courts, and plaintiffs who sue in the superior courts in certain cases which might be brought before the county courts are deprived of costs. By the statute in question, a similar jurisdiction is given to the sheriff's court of the city of London; and by the 113th section it is enacted, "If any action shall be commenced in the superior courts, (except in certain cases provided for by the previous section,) for which a plaint might have been entered in a court holden under the provisions of this act, and a verdict shall be found for the plaintiff for a sum not more than 20*l*. if the action is founded on contract, or less than 5*l*. if it be founded on tort, the plaintiff shall have judgment to recover such sum only and no costs; unless the judge shall certify," &c.

Bramwell showed cause. This rule ought to be discharged as superfluous, under the 13 & 14 Vict. c. 61. Under both the 9 & 10 Vict. c. 95, and the 10 & 11 Vict. c. 71, the mode of depriving a plaintiff of his costs was by application for leave to enter a suggestion for that purpose. But now, by the 11th section of the 13 & 14 Vict. c. 61, "If in *any action* commenced after the passing of this act in any of her majesty's superior courts of record, in covenant, debt, detinue, or *assumpsit*, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l*., or if in any action commenced after the passing of this act in any of her majesty's superior courts of record, in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5*l*., the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter provided, and except in the case of a judgment by default; and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs," &c. By the next section the plaintiff in any such action is

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to have his costs if the judge or presiding officer certify for them. The other side will contend that this statute must be understood with reference to the general County Court Act, and leaves the London act untouched; but the test whether this suggestion is requisite is to see whether the plaintiff could tax his costs supposing nothing further done by the defendant. Now the judgment is for a sum not exceeding 20*l.*, and the court cannot discriminate on the face of the record whether the case is within the general act or the London act. If the former, no costs would be allowed the plaintiff unless he produces the order of a judge, and if the latter, that fact ought to be made to appear by suggestion or other proceeding on the part of the plaintiff.

Prentice, contra. The general scope and language of the 13 & 14 Vict. c. 61, show that it was not meant to affect the London Small Debts Act. Its 1st section, after referring to the general County Court Acts, 9 & 10 Vict. c. 95, and 12 & 13 Vict. c. 101, without any allusion to the 10 & 11 Vict. c. 71, enacts, that "the jurisdiction of the several courts" holden under those acts shall be extended to 50*l.* The 2d section enacts, that "this act and the *said recited acts* shall be read and construed as one act," &c., and by sect. 3, no deputy judge of any *such* county court shall practise as a barrister within his district. The other side rely on the language of the 11th section, that "if in *any action*," &c.; but the 12th and 13th sections show that those words must not be understood in an unlimited sense; for the 12th section says, that "if the judge or other presiding officer shall certify, &c., that the cause of action was one for which a plaint could not have been entered in any *such* county court as aforesaid," &c., the plaintiff may have his costs; and by sect. 13 the plaintiff in any *such* action may recover his costs if he shall make it appear to the court or a judge that the action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 128th section of the County Court Act, 9 & 10 Vict. c. 95, or for which no plaint could have been entered in any *such* county court. If this rule be discharged, the other side will apply for costs to a judge at chambers under the discretionary power conferred by this 13th section; and the court ought therefore at least to allow us to put our suggestion on the record, leaving them to demur to it if they will.

The court then said the rule should be made absolute for a suggestion; *valeat quantum*.

Rule absolute.

• Key v. Thimbleby.

KEY v. THIMBLEBY.¹

Trinity Term, June 17, 1851.

Pleading — Payment of Money into Court.

In an action of trover for cattle, the defendant pleaded that the conversion complained of was a sale of the cattle by him after he had seized and impounded the same as surveyor of the highways, &c.; and that the plaintiff ought not further to maintain his action because the defendant now brings into court the sum of 10*l.* ready to be paid to the plaintiff, and that the plaintiff has not sustained damages to a greater amount, &c. : —

Held, that this plea was bad, as not warranted by the new rules.

TROVER for the conversion of three cows and two calves. Plea — “The defendant says that the said conversion of the said cattle, in the declaration mentioned, was the sale of the said cattle by the defendant after he had seized and impounded the same as surveyor of the highways of the parish of East Kirkby, in the county of Lincoln, according to the statute in that case made and provided; and the defendant further says that the plaintiff ought not further to maintain his action in respect of the said conversion, because the defendant now brings into court the sum of 10*l.* ready to be paid to the plaintiff; and the defendant further saith that the plaintiff has not sustained damages to a greater amount than the sum of 10*l.* in respect of the said conversion, and this he is ready to verify; wherefore he prays judgment if the plaintiff ought to maintain his action thereof.” To this plea there was a special demurrer, which was argued in Easter term, on the 2d of May, by

Bramwell, for the plaintiff, and

Crompton, for the defendant.

Cur. adv. vult.

The judgment of the court was now delivered by

POLLOCK, C. B. We are of opinion that this plea is not warranted by the new rules upon which it depends, and is therefore bad.

The plea of payment of money into court was given by the new rules, as a substitute for the supposed more expensive mode of paying into court by a rule to strike the sum out of the damages, which rule it was always necessary to prove at the trial, while this plea being on the record proves itself. It is not governed by the ordinary rules of pleading, for in actions of debt it denies in part the cause of action, but does not confess and avoid; in *assumpsit* and tort it does not deny, nor confess and avoid, and it appears to be more analogous to a judgment by default with an averment of damages than to a common plea. The form given by the new pleading rules allows, no doubt, of changes to adapt it to each case, as, for instance, where it is pleaded to part, or in debt to the damages as well as the debt, but no further.

¹ 15 Jur. 565.

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We have already held that the special character of the defendant is not required to be stated, and that the meaning of the terms "as near as may be" in the rule is only to authorize alterations to adapt the plea to the names of parties, the sum paid, and the like. *Aston v. Perkes*, 15 M. & W. 385. We are satisfied that it never was intended to admit such a variation as is attempted in this case, which would lead to long and embarrassing pleadings.

According to the new rules the plaintiff is at liberty, either to take the money out of court with his costs, or to reply damages *ultra*. They do not contemplate any other replication, and no plea is therefore contemplated except one which could lead to one of these results; whereas this might lead to a new assignment and pleadings thereon. In such a case, what is to become of the 10*l*? The plaintiff is not to have it, and the new rules do not provide for its being paid back; another reason for supposing that no such plea as this was intended by them. It is very true that it probably may be had back on a summons before a judge, and that the defendant would not lose the money, but the argument arising from the want of a provision in the new rules for such an emergency is the same.

Further, if the case be that the plaintiff is proceeding for the conversion of part of the cattle by the sale, and as to the remainder for some other conversion, how is he to reply? How much is he to ascribe to one cause of action, how much to another? and how can he tell whether enough is paid into court to satisfy the damages for which he is really proceeding?

Besides, the plea introduces what we believe is a perfect novelty in pleading, by making the defendant directly aver what the plaintiff's cause of action is, which presumably he cannot know. When the defendant supposes the cause of action to be one to which he has a defence, he pleads by confessing and avoiding it, and concludes usually, though always unnecessarily, with a *quæ sunt eadem*; for when the justification depends upon a temporary defence applying to a day different from that in the declaration, the defendant may either conclude with that averment or traverse all other days. 2 Wms. Saund. 5 *b* and *c*.

The plaintiff must now assign if he cannot deny the truth of the plea. But if such an averment as this was allowed, the defendant might drive the plaintiff to a new assignment, without any plea in confession; as, if after making such an averment, he was to suffer judgment by default as to that cause of action.

But then it is said that it may be a hardship on the defendant, who cannot know what the plaintiff's cause of action is, and has no legal means of knowing it, if he may not plead such a plea. This objection would have been exactly the same if the old mode of paying money into court had been continued, for which this is a substitute, and had been adopted by the act for the further amendment of the law. But in truth it is only an objection on the surface, as practically it is always competent for the defendant to obtain full particulars of the plaintiff's cause of action on a proper affidavit, the judges requiring, in all cases of action for tort, such an affidavit, other-

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wise an application for them would be made in every such action as a matter of course, to the increase of the costs of the cause. And if the defendant should not be able to obtain particulars so as to ascertain the true cause of action, his proper course is to exhaust his special defences, and when the plaintiff has newly assigned a cause of action to which he has no answer, to plead payment of money into court to that, or suffer judgment by default to it.

Such a plea as the present cannot therefore be allowed, and our judgment should, we think, be for the plaintiff. The defendant may however, if he please, amend on payment of costs.

Defendant to amend on payment of costs; otherwise judgment for the plaintiff.

READ v. LEGARD.¹

Trinity Term, May 30, 1851.

Lunacy — Baron and Feme — Debt.

The wife of a lunatic, even though confined in an asylum as dangerous, may pledge his credit for necessaries for herself; and the persons who have supplied her with such may sue the husband in an action of debt.

DEBT. The first count was for meat, drink, washing, lodging, and other necessaries alleged to have been found and provided by the plaintiff for the wife of the defendant, at his request. There was also a count on an account stated.

Pleas — First, *nunquam indebitatus*; secondly, to the first count, that at the time of the making of the supposed request in the first count mentioned, he, the defendant, was a lunatic and of unsound mind, whereof the plaintiff then had notice; and that the said meat, drink, &c., were not at the time of making the said request, or at the time of the finding and providing of the same necessaries, suitable to the estate, degree, and condition of the defendant, whereof the plaintiff at the time, &c., had notice. There was also a plea of lunacy to the second count, but on this a *nolle prosequi* was afterwards entered. The plaintiff took issue on the first plea, and to the second replied that the articles supplied were necessaries suitable, &c., and on this also issue was joined.

At the trial, before Martin, B., it appearing that the articles in respect of which this action was brought had been supplied to the defendant's wife, for her necessary support at a time when he was confined in an asylum as a dangerous lunatic, it was objected by the defendant's counsel that the plaintiff was not entitled to recover; that the power which a wife has of pledging her husband's credit is vested in her solely as his agent, and consequently cannot exist when from lunacy or any other cause he is incapable of appointing an

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agent. The judge, however, reserving leave to enter a nonsuit, overruled the objection, saying that that power arose out of the very relation of husband and wife, and left the case to the jury, who found a verdict for the plaintiff for 5*l.* 6*s.*

H. Hill, in Hilary term, obtained a rule accordingly; against which

Watson and *Ball* now showed cause. The principle by which a wife is permitted to pledge her husband's credit for her support does not rest on a supposed authority given to her by him to make the individual contract, and which might at any time be revoked; but on a general authority conferred by the matrimonial obligation, and irrevocable like it. That this is the true ground of the law on this subject appears from this, that although a man turns his wife out of doors, or conducts his house in so disreputable a manner that she cannot with propriety remain in it, she goes forth with authority to pledge his credit; and this even though he give public notice to the world not to trust her, as he will not be responsible for her debts. So, where a husband and wife live apart by mutual consent, the husband is, notwithstanding, liable for her reasonable maintenance, unless she is otherwise provided for; but a mere notice by the husband that he will not pay for goods supplied to his wife will not avail him, if under the circumstances of the separation he is liable. *Dixon v. Hurrell*, 8 Car. & P. 717. It would be unjust in the law to vest, as it does, all a woman's property in her husband, deprive her of all control over his, and then allow her to starve if he becomes insane.

[*Alderson*, B. The Court of Chancery is the tribunal for matters of lunacy. Should you not apply to it in cases like the present?

Platt, B. Still we must look to the *legal* rights of the parties.]

While the grass is growing, the steed starves; while the Court of Chancery is deciding the cause, the woman might starve. The subject of the liability of lunatics was much discussed in the case of *Molton v. Camroux*, 2 Exch. 487; 12 Jur. 800; affirmed on error, 4 Exch. 487, where most of the cases are collected, and the following principles laid down by the court: "We are not disposed to lay down so general a proposition, as that all executed contracts, *bona fide* entered into, must be taken as valid, though one of the parties be of unsound mind; we think, however, that we may safely conclude, that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bona fide*, and which is executed and completed, and the property, the subject matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic or those who represent him." A lunatic may contract for necessities supplied to himself, and his estate is liable on a contract for such made for him by others, as otherwise he might be left destitute. *Baxter v. The Earl of Portsmouth*, 5 B. & Cr. 170,

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is an authority for this; and in *Williams v. Wentworth*, 5 Beav. 325, Lord Langdale says, "I am of opinion, that where money has been expended for the necessary protection of the person and estate of a lunatic, the law will raise an implied contract, and give a valid demand or debt, against the lunatic or his estate. . . . Any other conclusion would, as it appears to me, be extremely dangerous."

[*Ball* also read his note of a recent case of *Seton v. Adcock*, where Lord Campbell, C. J., said, "I am of opinion that a lunatic is liable for necessities supplied to him by a person who knew he was a lunatic."]

One of the chief cases on the immediate question is that of *Manby v. Scott*, 1 Lev. 4; 1 Sid. 109, translated in 2 Smith's L. C. 249, where some of the judges say, (p. 252,) "Here the question is, Will the contract of a wife for necessities make her husband liable? For nobody will dispute that usually the contracts of wives are void, as all their power is transferred to the husband by their marriage. Yet, as to matters necessary '*ad sustentationem vite*,' this power is not transferred, but, on the contrary, established and made absolute in the wife by means of the marriage. This is founded on the necessity of the thing; and our law allows many persons who are otherwise disabled in cases of necessity to enter into contracts; as an instance, it is a general rule that the contracts of all infants are void, but, nevertheless, in cases of necessity their contracts shall bind them." And in p. 253, "As our law gives all that the wife has to her husband on marriage, if wives shall not be allowed to obtain food and other necessities, wives will be in a worse condition than those who commit treason or felony, for felons shall be allowed from their goods reasonable estovers, to save them from starving. And the statute Art. Cler. provides that persons who abjure the realm shall have sufficient estovers of their goods. But women cannot enjoy this privilege if they can take nothing without the permission of their husbands, but they will be left to perish, Tantalus-like, from thirst and hunger, amid the overflowing exuberance of their husband's plenty." The other side will probably rely on the language of Parke, B., in *Tarbut v. Bispham*, 2 M. & W. 2, that a lunatic cannot appoint an agent; but that dictum was not necessary to the decision of that case, and the present does not depend on agency at all.

H. Hill, in support of the rule. The question in this case is one of considerable importance. Not only has it never been decided judicially that by the mere fact of marriage a man confers on his wife an irrevocable authority to bind his credit, but every thing tends to show that her right so to do is derived from some act, real or supposed, of the husband done after the marriage, and which he must be in a condition to persist in or revoke. Even in the case put of a man turning his wife out of doors and cautioning others against trusting her, there is such an act to which, however, the law attaches a consequence different from what the party designed. When, therefore, a man by the act of God becomes lunatic, and especially when he is in confinement as such, he is alike unable to give his wife

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authority to contract in his name, or determine whether she ought to continue to live with him, or what expenses would be reasonable for her maintenance.

Several authorities are to be found in the books relative to the principle on which husbands are liable for the contracts of their wives. The earliest is in F. N. B., 120 G., "A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority unto his bailiff or servant to buy and sell for him; and so for the contract of the wife, *if he give such authority to his wife, otherwise not.*" So *Eltherington v. Parrot*, 1 Salk. 118, is an authority that the reason why the husband is bound by the contracts of his wife in any case is that his consent to them is presumed.

The celebrated case of *Manby v. Scott* has been referred to by the other side; but the language quoted is that of the judges who were in the minority on that occasion. The following passages from that case are found in 2 Smith's L. C. 261, 262: "I will report concisely several points established in this great case. First. The resolutions in which all the judges of England agreed, and these were reported by the chief baron to be—1. That husbands are bound to supply their wives with necessities; and here they agree *de re*, though they differ *de modo*. 2. That the contract of a married woman is merely void, as far as she is concerned, by our law, however it may be different by the civil law. 3. If the wife purchase goods, and the husband, by any act precedent or subsequent, ratifies the contract by his assent, the husband shall be liable upon it; if not on his *assumpsit* in law, yet on his *assumpsit* in fact, whether the goods are for himself, or for his children, or for his family, all which positions are so obvious that they require no demonstration. Secondly. The resolutions of those who gave judgment for the defendant, (except Atkins, B.,) and these were—1. That the marriage does not give the wife any innate and uncontrollable power to render the husband liable. 2. That although the wife cannot bind her husband by her contract, yet she is not without a remedy; but by the common law, chancery may order her necessities, or, at least, the common law (which is subservient to it) in the spiritual court. 3. That if the wife purchase goods, and it is found by special verdict that they were consumed in the household, yet the husband shall not be liable for them. But it shall be good evidence for the jury to find that the husband '*assumpsit*,' but not conclusive evidence. 4. That admitting that the husband shall be liable, in *assumpsit* at law, still if he specially forbids particular persons to trust his wife, the husband shall not be liable in spite of this prohibition. 5. Admitting that husbands shall be liable in *assumpsit* at law for necessities, the finding of the jury that the goods purchased for the wife are necessities suitable to the degree of her husband, is not good." And in p. 264, "6. To charge the husband on the contract of his wife, without his actual assent, will tend to subvert the law of God and of nature, which have given the husband power and government over his wife; and this is the very saying of God himself, '*Erga virum appetitus tuus erit, et ipse regnabit in te*,' and as to their supposition, that wives will be starved, our law does

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not presume this, but the contrary." The doctrine of *Manby v. Scott* was followed up in *Calverly v. Plummer*, 2 Lev. 16. There a husband left his wife in the country, came to London and married another woman, for which he was indicted, and the wife came to London to prosecute him; upon which he was convicted and had his clergy. He, on the other hand, having caused her to be arrested, it was held that the jailer to whose custody she was committed could not maintain an action against him for her diet and lodging while in prison; and this on the ground that the husband was not chargeable without some evidence of his assent to the jailer thus supplying her. In *Montague v. Benedict*, 3 B. & Cr. 631, Bayley, J., says, "I take the rule of law to be this: If a man, without any justifiable cause, turns away his wife, he is bound, by any contract she may make, for necessities suitable to her degree and estate. If the husband and wife live together, and the husband will not supply her with necessities, or the means of obtaining them, then, although she has her remedy in the ecclesiastical court, yet she is still at liberty to pledge the credit of her husband for what is strictly necessary for her own support. But whenever the husband and wife are living together, and he provides her with necessities, the husband is not bound by contracts of the wife, except where there is reasonable evidence to show that the wife has made the contract with his assent." Similar language is used by Holroyd, J.; and Littledale, J., says, "The husband is not liable in respect of a contract made by his wife without his assent to it, and a party seeking to charge him in respect of such a contract, is bound either to prove an express assent on his part, or circumstances from which such assent is to be implied."

[*Alderson*, B. In *Montague v. Benedict*, the articles supplied were jewelry. A man is under no legal obligation to furnish his wife with any thing beyond necessities, and therefore, when any one supplies her with articles which do not come under that description, the husband is not liable unless he assents to it.]

In *Seaton v. Benedict*, 5 Bing. 28, Best, C. J., says, "The husband is only liable for debts contracted by his wife on the assumption that she acts as his agent. If he omits to furnish her with necessities, he makes her impliedly his agent to purchase them."

[*Alderson*, B. It is a monstrous proposition that a man who drives a woman out of doors, who hates, who abominates her, *actually* gives her authority to make contracts for him.]

POLLOCK, C. B. This rule must be discharged. The question raised by it is, whether an action can be maintained against a defendant, who has been a lunatic, for things supplied for the necessary support of his wife during the lunacy. It appears to me that the defendant is liable in such an action. The action is founded on this, that the defendant has taken on him a duty — having contracted marriage with the person sustained by the plaintiff, he has thereby become in point of law liable for her maintenance, and if he fails to provide for that maintenance, except under certain circumstances which justify him in withholding it, she has authority to pledge his credit to pro-

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cure it. It may be true, as stated by Mr. Hill, that no case has yet arisen in which this precise point was brought before any court; but, on the other hand, none of the *dicta* that occur in any of the cases cited furnish a clew to decide the present one adversely to the plaintiff. All the expressions on which Mr. Hill relies can be explained, as my brother Alderson has explained some of them, by saying that in the cases where they are found the action was not brought for absolute necessities, but for matters beyond what was necessary, and where consequently the assent of the husband to their being supplied to his wife must be proved. Assuming then this to be the first time that this precise question has presented itself, what is the judgment to which we ought to come in a court of common law? The true principle seems to be, that when a man marries he contracts an obligation to support his wife, and in construction of law gives her an authority to pledge his credit for her support, if from any circumstances it should become necessary for her so to do, the wife herself not being in fault. That authority is not removed by his becoming insane; and it certainly would be very hard if, as by marriage the husband is entitled to all his wife's personal property, those who act for him in the event of his lunacy could reduce the whole of it into possession for his use, and yet the wife have no claim on any part of it for her daily bread.

ALDERSON, B. By the marriage contract entered into by the parties when in their sound senses, the husband contracts a relation which gives certain rights to his wife, and it is sufficient for us to say that one of them is, that she is entitled to be supported according to the estate and condition of her husband. If, through the omission or misconduct of her husband, she is compelled to procure the necessary articles for herself, as, for instance, where he drives her out of his house, or brings improper persons into his house so that any respectable woman must leave it, he does, according to the cases, give her authority to pledge his credit for her necessary sustenance elsewhere, i. e., he has given her such authority by force of the original relation between husband and wife. So, where he omits to furnish her with necessities while living with him, she may procure them elsewhere, as otherwise she might perish. Here the husband being lunatic, and by God's visitation unable to provide her with necessities, she surely must be considered as in a situation where a neighbor may furnish her with them; and then, as by the relation which he has originally contracted the husband should have provided her with them himself, he becomes liable to the person who does it for him. I go no further than this.

PLATT, B. The defendant having entered into a relation by which he undertakes to provide for the maintenance of his wife, it cannot be contended that his becoming insane releases him from the obligation. Suppose a man who executes a deed or warrant of attorney were afterwards to become insane, surely his insanity would not revoke the authority conferred by the instrument.

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MARTIN, B. My brother Alderson has stated the real truth respecting the obligation of the defendant and the principle of his liability; namely, that by contracting the relation of marriage a husband takes on him the duty of supplying his wife with necessaries; and if he does not perform that duty, either through his own fault or in consequence of a misfortune of this kind, the wife has in consequence of that relation a right to provide herself with them, and the husband is responsible for them. And although in the declaration the debt sued on is alleged to be the debt of the defendant contracted at his request, the truth is that it is the wife who contracts the debt, while the husband is responsible for it.

*Rule discharged.*¹

EDWARDS v. THE CAMERON'S RAILWAY COMPANY.²

Trinity Term, May 27, 1851.

7 & 8 Vict. c. 110, s. 66 and 68 — *Jurisdiction of Judge.*

Where an application under the 7 & 8 Vict. c. 110, s. 66 and 68, for execution against a shareholder in a joint-stock company on a judgment obtained against the company is refused, no fresh application can be made without a fresh notice; and this even though the first application were made to a judge who had no jurisdiction.

Quære, whether, notwithstanding the 1 & 2 Vict. c. 45, s. 1, such applications can be made to a judge who is not a judge of the court in which the judgment has been obtained.

[*Corder v. The Universal Gas-light Company*, 6 Com. B. 199, affirmed. — Ed.]

THIS was a rule calling on Richard Hallett, a shareholder in the Cameron's Railway Company, to show cause why execution should not issue against him under the 7 & 8 Vict. c. 110, s. 66 and 68, on a judgment of this court obtained by the plaintiff against the company. The notice of motion required by the latter of these sections was given, which, after stating the judgment in the Exchequer, and that due diligence had been used to obtain satisfaction against the property of the company, proceeded thus: "And I hereby further give you notice that, after the expiration of ten days after service of this notice upon you, application will be made, &c., to the said Court of Exchequer, or to a judge of the said court, for a summons to be issued against you to show cause," &c. Application was accordingly made to Wightman, J., who declined to interfere, as he was not a judge of the court in which the judgment was obtained.

Peacock now appeared to show cause; but

The court, stopping him, referred to *Corder v. The Universal Gas-light Company*, 6 C. B. 190, as an authority in point, and called on

¹ A similar doctrine was laid down in *Shaw v. Thompson*, 16 Pickering, 198. (1834.) The liability of the husband to support his wife arises from the relation of husband and wife, and he would be bound to pay for her necessaries, in the absence of any fault on her part, although he was himself *non compos*, or was an infant at the time of such supply.

² 15 Jur. 470.

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Bovill, in support of the rule. The mode of issuing execution against the shareholders of a company like the present on judgments obtained against the company is pointed out solely in the 68th section of the 7 & 8 Vict. c. 110, which enacts that it may be issued "by leave of the court or of a judge of the court in which such judgment, &c., shall have been obtained." The judge of any other court has therefore no jurisdiction to interfere; and it was so held not only by Wightman, J., in the present case, but by Parke, B., in the case cited, and recently, as is said, by Talfourd, J.

[*Pollock*, C. B. Does not the 1 & 2 Vict. c. 45, s. 1, meet this case, which enacts that "every judge of the Courts of Queen's Bench, Common Pleas, or Exchequer, shall have equal jurisdiction, power, and authority to transact out of court such business as may, according to the course and practice of the court, be so transacted by a single judge, relating to any suit or proceeding, in either of the said Courts of Queen's Bench or Common Pleas, or on the common law or revenue side of the said Court of Exchequer, or relating to the granting writs of *certiorari* or *habeas corpus*, or the admitting prisoners on criminal charges to bail, or the issuing of extents or other process for the recovery of debts due to her majesty, or relating to any other matter or thing usually transacted out of court, although the said courts have no common jurisdiction therein, in like manner as if the judge transacting such business had been a judge of the court to which the same by law belongs" ?]

The power there given is limited to the business usually transacted out of court by a single judge; whereas this is the case of a peculiar jurisdiction, to be exercised by the judge in a particular way. Besides, that statute existed before the present one, and the legislature which passed it must be supposed to have been acquainted with the then existing law.

POLLOCK, C. B. This rule must be discharged. In the case of *Corder v. The Universal Gas-light Company*, the Court of Common Pleas put a construction on this statute, and we ought not needlessly to question the recent decision of a court of concurrent jurisdiction. Now, our discharging this rule does not leave you without remedy, for you can give a fresh notice.

ALDERSON, B. In that case, the Court of Common Pleas has decided, that by going before the judge after giving ten days' notice you exhaust that notice, and cannot be allowed to say that you have gone to the wrong judge. I am disposed to think that you are right in contending that the judge has no jurisdiction, unless he is a judge of the court in which the judgment has been obtained. But here you are estopped by your own act; you have exhausted your notice, and must give a fresh one before you can make a fresh application.

PLATT and *MARTIN*, BB., concurred.

Rule discharged.

Harvey v. Towers.

HARVEY v. TOWERS.¹

Trinity Term, June 13, 1851.

*Evidence — Pleading — Onus Probandi — Bill of Exchange —
Fraud — Consideration.*

In an action by the indorsee against the acceptor of a bill of exchange, to which the defendant pleads that the bill was obtained from him by fraud, and was indorsed to the plaintiff without consideration, to which the plaintiff replies *de injuria*, although the plea would not be good without this latter averment, proof of the former turns on the plaintiff the *onus* of proving that he gave consideration for the bill.

Under such circumstances the judge determines whether there is evidence of fraud to go to the jury, and gives them a contingent direction, that if they think the fraud proved, the plaintiff is bound to satisfy them that he gave consideration for the bill.

Per Alderson, B. The *onus probandi* does not always lie on the party who asserts the affirmation of the issue; for when a negative averment is necessary to make a pleading good, the *onus* of proving that averment lies on the party who makes it.

ASSUMPSIT. The declaration stated that one J. B. Pellew made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of the said J. B. Pellew the sum of 200*l.*, four months after the date thereof, &c.; that the defendant accepted the said bill, and the said J. B. Pellew then indorsed the same to the plaintiff, &c. The defendant pleaded *non accepit* and *non indorsavit*; with several special pleas, of which the only material ones were the sixth, seventh, and eighth. The sixth plea alleged that the acceptance of the said bill was obtained from the defendant by the said J. B. Pellew and others in collusion with him, by fraud, covin, and misrepresentation practised upon him, the defendant, by the said J. B. Pellew and the said others in collusion with him, and that there never was any value or consideration for the said indorsement of the said bill by the said J. B. Pellew to the plaintiff, and that the plaintiff held the said bill without any value or consideration. Verification. The seventh and eighth pleas were similar to the sixth, except that instead of want of consideration for the indorsement of the bill, they alleged respectively that the plaintiff took it with notice of the fraud, and that it was overdue at the time of indorsement. To these three pleas the plaintiff replied *de injuria*. At the trial, before Martin, B., the plaintiff having proved the acceptance and indorsement of the bill, the defendant adduced evidence in support of his special pleas; when it appeared that he was a hotel keeper at Liverpool, and that the consideration for the acceptance of the bill consisted of shares in a mining speculation which the drawer was carrying on in Cornwall, and much evidence was given to show the whole transaction fraudulent. His case closing here, it was objected by the plaintiff's counsel that those pleas were not established — that the defendant was bound to prove the averment in the sixth plea that the bill passed to the plaintiff without consideration, and the corresponding averments in the seventh

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and eighth: to which the defendant's counsel replied, that the proof of the bill's having been obtained in the first instance by fraud cast on the plaintiff the *onus* of proving that he gave consideration for it. The judge ruled with the plaintiff on this point, but said that he should take the opinion of the jury on the question of fraud. The plaintiff's counsel then replied, and the judge having charged the jury accordingly, they found that the bill was obtained from the defendant by fraud on the part of the drawer; whereupon the judge directed a verdict to be entered for the plaintiff, reserving leave to the defendant's counsel to move to enter a verdict on the sixth, seventh, and eighth pleas, or such of them as the court might direct; or, if the plaintiff desired it, to enter a nonsuit instead.

Wilkins, Serj., on the part of the defendant, having obtained, in Easter term, a rule to enter a nonsuit, —

E. James and *Maynard* showed cause. The plaintiff is entitled to have this rule discharged, on four grounds. First, the plaintiff in an action on a bill of exchange cannot be required to prove that he gave consideration for the bill, until it is shown to have been originally obtained by fraud or illegality. *Byles on Bills*, 94, 6th ed. *Mills v. Barber*, 1 M. & W. 425. But the existence of fraud or illegality sufficient to shift the burden of proof, is a preliminary question of fact to be determined by the judge, not the jury. All preliminary questions of fact are determined by the judge, otherwise it would be necessary to take a sort of episodic verdict. Thus, where the admissibility in evidence of a bill of exchange was objected to on the ground that though dated abroad it was in truth an inland bill, and if so was not properly stamped, it was held that the fact where the bill was drawn was to be decided by the judge, not the jury; *Bartlett v. Smith*, 11 M. & W. 483; and whether there was reasonable and probable cause for doing an act is for the judge, leaving to the jury to find the facts afterwards. And the judge is also to determine the *mode* in which consideration must be proved, and direct the jury accordingly; as, for instance, whether the occasion on which the bill was given rebuts the presumption of consideration. *Bingham v. Stanley*, 2 Q. B. 117, is an authority for this. That was an action by the holder against the maker of a check, who delivered it to A B, who delivered it to the defendant. The defendant pleaded that he gave the check to secure a sum of money lent him by A B for the purpose of playing at an illegal game, and that A B delivered it to the plaintiff without any consideration, and for the mere purpose of enabling the plaintiff to sue for the benefit of A B, and that there never was any consideration for the plaintiff being holder, but that he held and sued for the benefit of A B; to which the plaintiff replied that A B delivered the check to the plaintiff, who took it from A B for a good and sufficient consideration, and that the plaintiff before and at the commencement of the suit held it for such consideration. Issue having been joined on this replication, it was held that it lay on the plaintiff to prove that he gave consideration for the check. Lord

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Denman, C. J., in delivering the judgment of the court, says, "The issue in this case was in its terms plainly affirmative on the part of the plaintiff; and the *onus* therefore lay on him. So it would, if the plea had been that the bill was accepted for the accommodation of the drawer and indorsed by him to the plaintiff without consideration, and the plaintiff had replied that he gave consideration. The difference between the two cases is not as to the *onus* of proving the issue; in both it is on the plaintiff: the difference is as to the mode of proving the issue, and as to what shall be treated as sufficient proof by the plaintiff. And in this respect it remains as it was when the general issue was pleaded. In the case of an accommodation bill, the production of the bill is sufficient *prima facie* proof by the plaintiff; in the case of an illegal bill, or one on which suspicion of fraud is cast, the plaintiff must go further. Under the general issue, that illegality or that suspicion was shown by evidence on the part of the defendant: now it is shown by the defendant's allegations in his plea, and not denied by the plaintiff."

[*Alderson*, B. I do not at all go the length of that. The first proposition laid down by Lord Denman, that the affirmative of the issue determines the burden of proof, is notoriously not true.

Platt, B. In an action of covenant against a tenant for not keeping a house in repair, it is for the plaintiff to show that the house was out of repair.

Alderson, B. When it is necessary to make a negative averment in a pleading in order to render the pleading good, the *onus* of proving that negative averment lies on the party who makes it. But the case of *Bailey v. Bidwell*, 13 M. & W. 73, is an authority that the fact that a bill of exchange was obtained by fraud or illegality may reasonably raise the inference that it passed to the holder without consideration, and so change the burden of proof.

Crompton, for the defendant, here referred to *Smith v. Braine*, 20 L. J., Q. B., 201; s. c. 3 Eng. Rep. 379.]

Bingham v. Stanley was recognized in *Carter v. James*, 13 M. & W. 137. In *Coxhead v. Richards*, 2 C. B. 569, which was an action for a libel, the defence being that the showing of the document was a privileged communication, Cresswell J., (p. 584,) asks, "Is not the rule this — whether the occasion is such as to rebut the inference of malice, if the publication is *bona fide*, is a question of law for the judge; whether the *bona fides* existed, is a question of fact for the jury?"

[*Alderson*, B. The present case is simply this — the judge leaves to the jury the question of fraud, with a contingent direction, "If you find the fraud, I am of opinion that the proof of his having given consideration for the bill lies on the plaintiff."]

Secondly, it is not now open to the defendant to question the decision of the judge on the question of fraud, the rule not having been moved on that ground. Thirdly, supposing the question of fraud was to be determined by the jury, their finding was against the evidence, and there ought to be a new trial. On this point, *Attwood v. Small*, 6 Cl. & Fin. 232, was referred to. Fourthly, if the judge was

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wrong, the plaintiff is entitled to a new trial as for a misdirection, for in consequence of his ruling that no proof of consideration was necessary, the plaintiff was prevented from giving proof of it. It is like those cases where, in consequence of the decision of a judge in his favor, a party is prevented from tendering a bill of exceptions. *Owen v. De Beauvoir*, 16 M. & W. 547.

Wilkins, Serj., and *Crompton*, who appeared to support the rule, were not called on.

POLLOCK, C. B. This rule must be made absolute to enter a nonsuit. This is an action on a bill of exchange, with a plea of fraud; which, according to the ordinary course of pleading, contains an allegation not merely of the fraud in obtaining the bill, but that the plaintiff gave no consideration for it. In point of law that last allegation was necessary to make the plea a perfect answer to the action; for though a bill of exchange may have been originally concocted in fraud, or obtained by fraud, though it may have been stolen, or a party may have been swindled out of it, this is no defence to an action by the holder unless he has obtained it without having given value, and he may sue on it notwithstanding such defect in the title of some one else. At the trial, my brother Martin thought that proof of fraud under this plea did not cast on the plaintiff the burden of showing that he gave value for the bill, but he said, "I will take the opinion of the jury on the existence of the fraud, and reserve leave to the defendant to move to enter a verdict for himself on the pleas raising it, if the court should think that that fact threw the *onus* of proving consideration on the plaintiff; with leave then to the plaintiff, if he prefers it, to have a nonsuit entered." The entering a nonsuit therefore is what the plaintiff now asks for, unless the court give him better terms, which they will not do. In that state of things, my brother Wilkins, on the part of the defendant, moved to enter a nonsuit, thinking, I presume, that the preferable course. Several matters have been contended on the argument, to which we need not refer at length. The material point is this, where a plea of fraud is established, does that throw on the holder of the bill to prove he gave value for it? As a general question of law, that was established long ago, at the time when the defendant, in an action on a bill of exchange, was not embarrassed by many rules of pleading. At one time some judges thought that if you showed a bill to be an accommodation bill, especially if you gave the plaintiff notice, it cast on him the burden of proving consideration. But the situation of a party in this respect ought not to be changed by a notice, and therefore Lord Campbell properly says, in *Smith v. Braine*, that the cases before the new rules on that subject are loose, and that it is difficult to collect a principle from them. But it has always been established, that if a bill is founded in illegality or fraud, or has been the subject of felony or fraud, on that fact being proved, the holder is compelled to show himself a *bona fide* holder for value. That was established in the case of *Bailey v. Bidwell*, and recently by the Court of Queen's Bench, in *Smith v. Braine*, in a well-considered judgment of

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Lord Campbell. It has been contended that, treated as a matter of pleading, this view will not hold. I am rather disposed to think, that as a plea must contain every thing necessary to constitute a good defence, and the facts here relied on would not be a good defence unless the holder did not give value for the bill, the defendant should have *alleged* that fact in his plea; and the question is, On whom does the *onus* lie to make the proof? I had some difficulty in making out the four propositions put forward by Mr. Maynard, particularly his expression that the judge is to decide the *mode* in which consideration of a bill is to be proved. As to the illustration from the case of the bill of exchange which wanted a proper stamp, no doubt the judge is to decide whether a bill is properly stamped; but the reason is a technical one, that wherever a question arises as to whether a document is to be admitted in evidence or not, the facts on which the admissibility or non-admissibility of that document depends are for the judge, the jury have nothing to do with them—it is a sort of intermediate issue, to be determined by the judge. Mr. Maynard was therefore right in his illustration, but wrong in applying that rule to this case, for the judge has nothing to do with the mode of proving consideration: when it is necessary to prove consideration, the party must prove it as he best may—it is for the judge to decide if he proves it at all, for the jury if he proves it in reality. The cases cited show that so far as my brother Martin at the trial ruled that proof of fraud alone in the absence of any proof of want of consideration in the plaintiff is not a good defence, he was wrong. The other argument pressed by Mr. James, that the jury are only to find the truth of the plea, and not the law, is too narrow and technical. The case was submitted to the jury with reference to the law as laid down in *Bailey v. Bidwell* and *Smith v. Braine*, and the jury have found the plea, for they found all that it was necessary for the defendant to prove, if not contradicted. [The lord chief baron then gave it as his opinion that the plaintiff was precluded from taking his other objections by the arrangement made at the trial; and that the rule should be absolute to enter a nonsuit, in order to enable the plaintiff, if he pleased, to bring a fresh action.]

ALDERSON, B. I am of the same opinion. I consider the form of pleading in this case to be right, and the rule laid down in *Bailey v. Bidwell* and *Smith v. Braine* to be right also. At first I was much struck with the observation that it would be unnecessary in a plea like this to aver that the plaintiff gave no consideration for the bill, if that fact was to be inferred from the bill's having been obtained by fraud. But when you come to consider the real state of the whole record, it opens a different view. The truth is, the declaration contains an averment that there was an indorsement of the bill to the plaintiff. That is an ambiguous expression, for it may mean either an indorsement *simpliciter* to part with the possession, or an indorsement for valuable consideration—it is open to either of these constructions. If therefore you plead fraud alone, and do not negative the averment in the declaration in the latter sense, the plea would be

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bad, for it would be consistent with the averment that there had been an indorsement for value. It is therefore necessary to add, that the bill was not passed to the plaintiff for valuable consideration, and put that as the only sense in which the averment of indorsement mentioned in the declaration is to be understood. If the plaintiff then says that averment means that there was an indorsement to him for value, he says so by his replication, and he must prove it, because he has in fact made the averment in his declaration.

PLATT, B., delivered judgment to the same effect; observing that the cases of *Bailey v. Bidwell* and *Smith v. Braine* were the decisions of eight judges: and that the casting the burden of proving consideration on the holder of a bill shown to be effected by fraud, was an extremely just rule; as he must best know what consideration he gave for it.

MARTIN, B. I am of the same opinion. Substantially this case is decided by the two which have been cited. But although I consider us bound by their authority, I own I do not understand them. Here is a plea that a bill was obtained by fraud, and that the plaintiff gave no value for it; and how it is that the fact that a bill was obtained by the drawer by fraud in Liverpool is evidence that the plaintiff gave no consideration for it in Cornwall, I do not understand. But such is the law, and I am not sorry for it: for there can be no doubt that the existence of such a rule throws a difficulty in the way of this sort of fraudulent bills; and although I do not understand, when several facts are alleged in a plea, all of which are necessary to make it good, and the plaintiff by his replication *de injuria* calls on the defendant to prove them all, how proof of one of those facts shifts the burden of proof of the rest, whatever may be the philosophy of that matter, the rule is a useful one for the reason I have stated.

Rule absolute.

IN THE EXCHEQUER CHAMBER.

[ERROR FROM THE COURT OF EXCHEQUER.]

OWENS v. BREESE.¹

Trinity Vacation, June 21, 1851.

Writ of Trial — Court of Record — County Court — Error.

A writ of trial, under the 3 & 4 Will. 4, c. 42, cannot be directed to a judge of a county court established under the 9 & 10 Vict. c. 95.

In this case, issue having been joined in an action of debt for a sum under 20*l.*, an order had been made by Wightman, J., for a writ of trial, under the 3 & 4 Will. 4, c. 42, s. 17, directed to a judge

of a county court held under the 9 & 10 Vict. c. 95. The cause was tried by him and a jury of twelve men, and a verdict was found for the plaintiff. A motion was then made in the Court of Exchequer to set aside the judge's order, upon the ground, *inter alia*, that the trial was had without jurisdiction.¹ The court being equally divided upon this point, the rule was discharged, without costs, and thereupon the present writ of error was brought.

Bramwell, for the defendant in error, was called upon. He was ready to admit that the county court was not a court before which this action could have been tried, if jurisdiction were given by the act of William IV. to the court instead of to the judge. The question, however, did not turn upon the constitution of the court, but whether the judge was "a judge of a court of record for the recovery of debt." By the 17th section of the 3 & 4 Will. 4, c. 42, in actions for any debt or demand not exceeding 20*l.*, the superior courts may order the issue or issues joined to be tried "before the sheriff of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county, and for that purpose a writ shall issue directed to such sheriff," ("or judge," which words should have been inserted, as the court held in *Clark v. Marner*, 2 Dowl. 774,) "commanding him to try such issue or issues by a jury to be summoned by him; . . . and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues." Jurisdiction is here given, not to the court, but to the person; and that was the intention of the legislature in framing the section in question. If the act be read as merely designating the person by reference to his office, all difficulty disappears. The writ is to go to "the judge," and is to command "him" to summon a jury. The writ does not go to any ministerial officer of the court, who might properly be required to summon the jury, but it says that the judge is to summon them. Now, the judge in this case came within the very description of the act. He was "a judge of a court of record for the recovery of debt."

[*Cresswell, J.* If the words used in the act be a mere *designatio personæ*, why should it say judge of any "court of record"? He would not be constituted a court of record under this commission; he could not commit for contempt.]

. The only convenient mode of defining him was to define him by his court; and there is a reasonable presumption that a judge of a court of record will be qualified to try the cases sent to him under the act. To insult the judge, or the like, might be a contempt of the court from which the writ issued. Every incident which properly belongs to a trial of a cause would belong to such a trial. In the court below, Alderson, B., said, "These courts (county courts) do not proceed according to the rules of the common law; but if my

¹ There was also another ground upon which the court held the order to be bad, viz., that although the writ was to be directed to the judge, it was to be returned by the sheriff. See the case in the court below, 3 Eng. Rep. 589.

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view of this act be correct, the judge of a county court, who tries a cause under a writ of trial, must try it by the rules of the common law, for he must summon a jury. By the 18th section of stat. 3 & 4 Will. 4, c. 42, the judge to whom a writ of trial is directed has all the powers of a judge at *nisi prius*; and a new trial will be granted if a judge at *nisi prius* does not proceed according to the rules of the common law; consequently the judge of a county court in such a case must not examine the parties, and if he were to do so, I would grant a new trial." The judge, without any special directions, is to try as the sheriff would try, not by a jury of five, but of twelve.

[*Patteson, J.* Sect. 72 of stat. 9 & 10 Vict. c. 95, provides that the sheriff shall furnish a list of jurymen, so far as they reside within the jurisdiction of the county court; and if the case be tried by a jury, the clerk is to summon them. So that the judge has materials for trying by a county jury; but then the act says that he must try by a jury of five.]

Being appointed under the statute of Victoria, he becomes a judge under the statute of William IV.; and then it is his duty to do what any other judge of a court of record would have to do, if a writ of trial were sent to him. He may do all that the general law would append to one of his office; and whatever the course of procedure in his own court, he is to issue a summons for a jury in his own name, and to act according to the common law. This case was, in fact, tried by a jury of twelve. Numerous orders of this kind have been made; and considering the disuse of many courts of record, and that a judge of a county court is better qualified to try a cause than a sheriff or the under sheriff, it is reasonable that they should continue to be made.

[*Erle, J.* The form of writ is given by rules of court, and they have the force of an act of Parliament. It commands the judge to summon "twelve" jurors.]

A statute applies to matters created by subsequent statutes. *Dwar. Stat.* 619. *Jones v. Williams*, 4 M. & W. 375. It may be conceded, however, that the statute of William IV. did not contemplate courts which proceeded contrary to the course of the common law. *Farmer v. Mountfort*, 8 M. & W. 266; 9 M. & W. 100, merely decided that a jury must be summoned by the recorder from his jurisdiction, and did not determine that he had no authority to try the cause.

[*Cresswell, J.* In that case, Lord Abinger, C. B., said, "It appears to me that the right construction of the statute is, that the inferior judge, to whom a writ of trial is directed, shall summon for the trial such a jury as by law and usage he is entitled to summon."]

Lush, for the plaintiff in error. The question is, whether county courts are such courts of record as are referred to by the statute of William IV. At the time of its passing there were three descriptions of inferior courts: courts of request; courts of record, acting according to the course of common law; and courts not of record. They are all mentioned in sect. 4 of stat. 8 & 9 Vict. c. 127. One class of courts therein mentioned is the same as that which is men-

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tioned in the statute of William IV. There was not at that period any court of record which did not proceed according to the course of common law, or which, therefore, tried causes by a jury less than twelve in number. The statute of William IV., as construed in *Farmer v. Mountfort*, was to enable judges of inferior courts of record to aid the judges of the superior courts, as the sheriff had been accustomed to do upon writs of inquiry. If the section in that act conferred powers as to the mode of trial not before possessed, there would have been special provisions for summoning a jury and the like. The section, however, assumes that they are able to do what they are ordered to do, and it was meant to apply only to one class of courts. The 23d section allows amendments to be made, and clearly refers to courts having records before them to amend. The 3d section of stat. 9 & 10 Vict. c. 95, makes county courts courts of record, but they are so only for certain purposes, like the bankruptcy and insolvency courts. They clearly do not proceed according to the course of the common law.

[*Maule, J.* Granting that the statute of William IV. might apply to new courts of record proceeding according to the common law, yet you say it is *harere in litera* to contend that it applies to such as are called courts of record.]

The county court is not such a court as can carry out the directions of the writ. The jury is to come from the county where the action is laid. By sect. 2 of stat. 9 & 10 Vict. c. 95, power is given to divide counties into districts, and sect. 72 merely empowers the summoning of a jury from the district. What jury is to be summoned under the writ? If one from the county at large, then the statute of William IV. of itself gives the judge new powers as to the mode of trial. The present county court is analogous to courts of request which existed at the time of the passing of the act of William IV., but it did not apply to them. Only eight courts of record have been abolished by the County Court Act; the other courts abolished are courts of request, as may be seen by referring to the schedules.

PATTESON, J. There is considerable difficulty in taking these two acts together. I should say that the statute of William IV. applies to subsequent courts of record proceeding according to common law. But the question is, whether these new county courts are such courts of record. If a writ of trial can be sent to the judges of them, they must proceed, not according to the County Court Act, but to the rules of law which prevail in the court out of which the writ issues. As the county courts, however, are an extension and new modelling of courts of request, and do not proceed according to common law, they are not such courts as were contemplated by the stat. 3 & 4 Will. 4, c. 42; they are not of the same kind. It is said to be desirable that the writs should go to the judges of the county courts; on the other hand, it is not desirable to try causes contrary to the usual mode adopted in a court. Although a judge acting under a writ of trial is rather a commissioner than a judge, yet it would be unseemly that the same person should try in two different ways.

Judgment for the plaintiff in error.

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DREW v. COLLINS.¹

Trinity Term, June 9, 1851.

Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106 — Arrangement by Deed — Month — Pleading.

The creditors of a trader unable to meet his engagements have no power under the 34th head of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, to enter into an arrangement with the trader, whereby a certain sum in the pound is to be paid to each of the creditors, and the surplus of his assets given to the trader—such a deed should distribute his estate among his creditors.

A plea of an arrangement by deed under the head of the statute should allege that the party was a trader for six calendar months preceding his suspension of payment.

THIS was an action of debt, brought by three plaintiffs, for goods sold and delivered, work, labor, and materials, with the money counts. The only material plea was pleaded to a part of the cause of action, and was as follows: "The defendant says, &c., that before and at the time of the making of the indenture hereinafter mentioned, and for six months and upwards, before the suspension of payment by the defendant as hereinafter mentioned, the defendant was a trader, to wit, a wholesale druggist, liable to the bankrupt laws, and within the meaning of the statute hereinafter mentioned. And the defendant further says, that before and at the time of the making of the indenture hereinafter mentioned, he, the defendant, was indebted to the parties thereto of the second and third parts respectively in divers sums of money, which said sums of money he, the defendant, was then unable to pay in full. And the defendant further says, that after the passing and coming into operation of 'The Bankrupt Law Consolidation Act, 1849,' to wit, on the 2d of May, 1850, he, the defendant, suspended payment; and afterwards, to wit, on the day and year last aforesaid, by a certain indenture then made between the defendant, of the first part, William Pearce, William Wells, and William Eames Heathfield, creditors of the defendant, of the second part; and the several other persons whose names and seals were thereunto set and affixed, being also creditors in their own right, or in copartnership, or being agents or attorneys of creditors of the defendant, of the third part, (pro-fer-ty;) after reciting that the defendant had for some time past carried on, and did then carry on, the trade or business of a druggist at Oxford Court, Cannon Street, in the city of London, and that in the course of his said trade or business, and otherwise, he had become and then was justly and truly indebted to the several persons, parties to the said indenture of the second and third parts, in the several sums of money set or to be then set opposite to their respective names, on the execution of the said indenture; and also, that by a memorandum in writing, bearing date the 26th of February, 1850, signed by six sevenths at the least of all the creditors of the defendant, to the extent of 10*l*. or upwards, both in number and value,

¹ 15 Jur. 584.

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within one month from the date thereof, the creditors of the defendant had agreed to accept a composition of 6s. 8d. in the pound on the amount of their respective debts, in full payment and satisfaction thereof, upon the terms, agreements, stipulations, and conditions, and payable in the time and in the manner in the said agreement and thereafter mentioned contained; the said W. Pearce, W. Wells, W. E. Heathfield, and the said several persons as parties thereto, as creditors, or attorneys, or agents of creditors, did give and grant unto the defendant full, free, and absolute liberty and license, according to his own free will and pleasure, to go, come, pass, repass, abide, and continue, to, from, and at all or any place or places he might require, and to manage, collect, get in, and dispose of all his estate, debts, and effects, under the inspection and control of the said W. Pearce, W. Wells, and W. E. Heathfield, or any two of them, and in such manner as they should judge to be most conducive to the benefit of the said creditors, from the 26th of February, 1850, until the 26th of February, which will be in the year 1852; and the said W. Pearce, W. Wells, W. E. Heathfield, and the said several persons parties thereto of the third part, did thereby for themselves respectively, and for their several and respective heirs, executors, administrators, and assigns, partners and constituents, but not any of them for the other or others of them, or for the heirs, executors, administrators, or assigns, acts or deeds of any other or others of them, covenant, promise, and agree with and to the defendant that they should not nor would, nor should nor would any other person or persons for them, or by the order, authority, assent, consent, or procurement of them respectively within the time aforesaid, sue, arrest, prosecute, molest, attach, detain, take in custody or execution, imprison or otherwise impede or incumber him, the defendant, or his estate or effects, in any manner howsoever; and also, that if any of them should do so, contrary to the true intent and meaning of the said indenture, the said indenture should operate to all intents and purposes, and might be pleaded in bar to the said respective debts, and to any prosecution, suit, action, or proceeding that should or might be brought or prosecuted against the said person of the defendant, his goods or chattels as aforesaid, within the time aforesaid, as effectually as if he had a general release under the hands and seals of such creditors respectively for that purpose, as in and by the said indenture, reference being thereunto had, will, amongst other things, more fully and at large appear. And the defendant further saith, that before the commencement of this suit, to wit, on the 2d of May, 1850, to wit, at the time of making the said indenture, the same was signed and sealed by the defendant; and that divers, to wit, one hundred of the creditors of the defendant, in their own right, signed the said indenture, and subscribed their names and affixed their seals thereto; and divers, to wit, one hundred others of the said creditors, by their agents and attorneys, respectively signed the said indenture, and subscribed their names and affixed their seals thereto. And the defendant further saith, that the said indenture at the time of the making thereof, and at all times, was a deed of arrangement between the defendant and

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his creditors within the meaning of the provisions of the statute made and passed in a session of Parliament holden in the twelfth and thirteenth years of the reign of her majesty the now queen, being the statute aforesaid; and that the said creditors, by whom and on whose behalf respectively the same was sealed as aforesaid, were six sevenths in number and value of the creditors of the defendant within the meaning of the said provisions of the said statute, whose debts amounted, within the meaning of the said provisions, to the sum of 10*l.* and upwards, accounting every creditor as a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property, and other such available securities or liens from the defendant, appeared to be the balance due to him. And the defendant further saith, that the plaintiffs were, at the time of the making the said indenture, creditors of the defendant in respect of the causes of action in the introductory part of this plea mentioned, within the meaning of the said statute; and that at the time of the making of the said indenture the amount in the introductory part of this plea mentioned was a debt then due from the defendant to the plaintiffs, within the meaning of the said indenture. And the defendant further says, that after the said suspension of payment, and after the said indenture had been so signed, and the names of such majority as aforesaid of creditors had been so subscribed and seals so affixed in manner aforesaid, to wit, on the 14th of August, 1850, the plaintiffs had notice, to wit, from the defendant, of the said suspension of payment, and of the said indenture of arrangement, and were then requested, to wit, by the defendant, to sign and execute the same; and the plaintiffs then might and could, if they would, have signed and executed the same as parties thereto of the third part. And the defendant further saith, that three calendar months from the time at which the plaintiffs had notice from the defendant of his said suspension of payment and the said deed had elapsed before the commencement of this suit. And the defendant further saith, that he, the defendant, hath from the time of the making of the said indenture in all respects performed and observed the covenants in the said indenture contained and on his part to be performed, and that the said W. Pearce, the said W. Wells, and the said W. E. Heathfield, parties to the said indenture of the second part, did, at and at all times after the making of the said indenture, assent to the terms thereof, and did act as such trustees and in the trusts of the said indenture. And the defendant further saith, that by reason of the premises and by force of the statute in that case made and provided, being the statute aforesaid, the said indenture heretofore, and before the commencement of this suit, to wit, on the 14th of November, in the year last aforesaid, became and was effectual and obligatory in all respects upon the plaintiffs, as if they had duly signed the same. And the defendant further saith, that the said deed of arrangement still remains in full force, and that the period during which the said liberty and license therein mentioned were given and granted to the defendant has not yet elapsed; and that by reason of the matters aforesaid, the defendant heretofore, and before the commencement of this action, to wit,

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on the day and year last aforesaid, became and was released and discharged in manner aforesaid from the said causes of action in the introductory part of this plea mentioned; and this the defendant is ready to verify," &c.

The plaintiff, after setting out the indenture on oyer,¹ demurred

¹ The importance of this case and nature of the questions raised render it necessary to give this document at length.

"This indenture, made on the 2d of May, 1850, between Robert Nelson Collins, of Oxford Court, Cannon Street, in the city of London, druggist, of the one part; William Pearce, of Bow Common, in the county of Middlesex, chemist, William Wells, of Budge Row, in the said city of London, cork merchant, and William Eames Heathfield, of Princes Square, Wilson Street, Finsbury, in the said county of Middlesex, chemist, being by themselves, or together with their respective partners, creditors of the said R. N. Collins, of the second part; and the several other persons whose names and seals are hereunto set and affixed, being also creditors in their own right, or in copartnership, or being agents or attorneys of creditors of the said R. N. Collins, of the third part.

"Whereas, the said R. N. Collins hath for some time past carried on and still carries on the trade or business of a druggist, at Oxford Court aforesaid, and in the course of his said trade or business, and otherwise, has become and now is justly and truly indebted to the several persons, parties to these presents of the second and third parts, in the several sums of money set or to be set opposite to their respective names, on the execution of these presents. And whereas, by a memorandum in writing, bearing date the 26th of February, 1850, signed by six sevenths, at the least, of all the creditors of the said R. N. Collins, to the extent of 10*l.* or upwards, both in number and value, within one month from the date thereof, the creditors of the said R. N. Collins have agreed to accept a composition of 6*s.* 8*d.* in the pound on the amount of their respective debts, in full payment and satisfaction thereof, upon the terms, agreements, stipulations, and conditions, and payable in the time and in the manner in the said agreement, and hereinafter mentioned, contained.

"Now this indenture witnesseth, that in pursuance of such agreement, and for carrying the same into effect, and for and in consideration of the covenants and agreements hereinafter contained on the part of the said R. N. Collins, they, the said W. Pearce, W. Wells, and W. E. Heathfield, and the several persons or parties hereto, as creditors, or attorneys or agents of creditors, have given and granted, and by these presents do, and each of them doth, so far as they respectively may and lawfully can, give and grant unto the said R. N. Collins, full, free, and absolute liberty and license, according to his own free will and pleasure, to go, come, pass, repass, abide, and continue to, from, and at all or any place or places as he may require, and to manage, collect, get in, and dispose of all his estate, debts, and effects, under the inspection and control of the said W. Pearce, W. Wells, and W. E. Heathfield, or any two of them, and in such manner as they shall judge to be most conducive to the benefit of the said creditors, from the 26th of February, 1850, until the 26th of February, which will be in the year 1852.

"And the said W. Pearce, W. Wells, and W. E. Heathfield, and the said several persons parties hereto of the third part, do hereby for themselves respectively, and for their several and respective heirs, executors, administrators, and assigns, partners and constituents, but not any of them for the other or others of them, or for the heirs, executors, administrators, or assigns, acts or deeds of any other or others of them, covenant, promise, and agree with and to the said R. N. Collins, his heirs, executors, and administrators, that they, or any other person or persons for them, or by the order and authority, assent, consent, or procurement of them respectively, shall not nor will, within the time aforesaid, sue, arrest, prosecute, molest, attach, detain, take in custody or execution, imprison, or otherwise impede or incumber him, the said R. N. Collins, or his estate or effects, in any manner howsoever. And further, that if any of them shall do so, contrary to the true intent and meaning of these presents, this present letter of license shall operate to all intents and purposes, and may be pleaded in bar to the said respective debts, and to any prosecution, suit, action, or other proceeding that shall or may be brought or prosecuted against the said person of the said R. N.

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specially to the plea, and the defendant having joined in demurrer, the case was argued by

Collins, his goods or chattels as aforesaid, within the time aforesaid, as effectually as if he had a general release under the hands and seals of such creditors respectively for that purpose.

"And the said R. N. Collins doth hereby, in further pursuance of the said agreement, and in consideration of the said license hereinbefore given unto him as aforesaid, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said W. Pearce, W. Wells, and W. E. Heathfield, and all other the creditors or partners, attorneys and agents of creditors of him, the said R. N. Collins, and each and every of them, that they, the said parties hereto of the second and third parts, shall respectively, by and out of the moneys to arise from the said estate and effects of him, the said R. N. Collins, receive and be paid the said composition or sum of 6s. 8d. in the pound upon the amount of their said respective debts, without any deduction or abatement whatsoever. And further, that he, the said R. N. Collins, shall and will, as soon as may be, draw out, state, and sign and deliver unto the said parties hereto of the second part, a formal, true, and exact account in writing of all his estate and effects, as well real as personal, and of the several charges, outgoings, and incumbrances now affecting the same, as the same respectively stood on the said 26th of February, 1850, and bring the said estate to a balance. And he, the said R. N. Collins, doth hereby further covenant, promise, and agree in manner aforesaid, that so long as the said sum or composition of 6s. 8d. in the pound, or any part thereof, shall remain unpaid, he shall and will from time to time, and all times, (any thing herein contained to the contrary notwithstanding,) in all things observe, perform, and execute the orders, instructions, and advice of them, the said parties hereto of the second part, or any two of them; and also shall and will use his best endeavors in and about the management and receiving, settling, and converting into money all the estate and effects of him, the said R. N. Collins, and also shall and will, if required in writing by all the said parties hereto of the second part, as to moneys now in his hands, and also hereafter, when and so often as there shall be moneys in hand arising from the said estate and effects, from time to time pay and deposit the same in such custody or into the hands of such banker as the said parties hereto of the second part shall direct, in the names and to the credit of the said parties hereto of the second part and of him the said R. N. Collins, to the end that the same may, if so required, be distributed among the several creditors in the manner hereinafter mentioned; and also that he, the said R. N. Collins, shall not nor will, at any time during the term aforesaid, unless with the consent and approbation of the said parties hereto of the second part, or the majority of them, unless he shall before that time have paid unto his creditors the full amount of the said composition, and except as hereinafter provided, convey, alienate, dispose of, pledge, or incur any of his real or personal estate, except such part or parts thereof as may be necessary in the ordinary course of his business; and also shall not nor will, by himself or with any other persons, become engaged in or undertake any new or other trade or commercial transaction than such as he at present carries on, except by and with the consent of the said parties hereto of the second part, and then only for the purpose of securing and facilitating payment of the said composition, and for the benefit and advantage of his creditors, parties hereto as aforesaid; and shall not nor will do or suffer to be done any act, deed, matter, or thing whatsoever whereby any of the creditors of him, the said R. N. Collins, shall or may obtain security or securities for his or their debt or debts, or the composition thereon as aforesaid, or any preference or priority of payment thereof, or of any part thereof, contrary to the true intent and meaning of these presents; and shall not nor will compound, release, or prejudice any debt or debts which may be due to him, nor bring any action or suit for recovering any debt or debts, without the authority and consent of the said parties hereto of the second part, or the majority of them. And further, that the said R. N. Collins shall and will, for the purposes of these presents, keep proper books of account, and enter or cause to be entered a fair, correct, and regular account of all receipts and payments, and of all other matters and things as shall be requisite, in order to show the true state and condition of his estate and effects, dealings, and transactions; and also shall and will preserve all letters received from, and take copies of all letters written or sent by him to all and every his correspondents or other

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Willes, for the plaintiff; and*O' Malley*, for the defendant.

person or persons whomsoever in connection therewith; and also shall and will permit them, the said W. Pearce, W. Wells, and W. E. Heathfield, or any of them, or any person or persons on their behalf, to examine, inspect, take copies of or extracts from the said accounts, papers, letters, and writings relating to the said matters, or any of them, when and as they shall think proper and require; and shall and will, upon being required by the said parties hereto of the second part, or the majority of them, so to do, make a declaration in writing before a competent magistrate of the amount and validity, truth and accuracy of any of the said accounts or statements of account made and kept, or to be made and kept by him, the said R. N. Collins, in pursuance of any of the provisions and agreements contained in these presents.

"And it is hereby declared and agreed by and between all the said parties hereto, that it shall and may be lawful to and for the said W. Pearce, W. Wells, and W. E. Heathfield, or any of them, to give such consent or directions as hereinbefore mentioned to the said R. N. Collins, and generally in all respects to act in any of the matters or things arising out of the said estate and effects, or, in consequence of these presents, as they or he may deem to be for the best advantage and benefit of the said estate. And that the said W. Pearce, W. Wells, and W. E. Heathfield shall not be charged or chargeable with any loss or damage to the said estate that may happen in consequence thereof. And further, that it shall be lawful for the said W. Pearce, W. Wells, and W. E. Heathfield, or one of them, by or through the said R. N. Collins, at the expense of the said trust estate, to inquire into, and, if need be, dispute and litigate the justness and amount of any debt or claim upon the said R. N. Collins, his estate or effects, whether of the parties hereto, or any of them, notwithstanding the previous execution by them or him of these presents, and insertion of the amount of such debt at the foot of these presents, or of any person or persons whomsoever; and also to compel payment of any debt or claim to or of the said R. N. Collins or his estate, and generally to settle any of such matters as aforesaid by compromise or otherwise, as they may deem best for the advantage of the creditors. And further, that all the moneys, bills, notes, or securities for money arising by or from the said estate and effects of the said R. N. Collins, and from the gains and profits of his said trade and transactions, and which shall be paid and delivered into such custody as aforesaid, shall there remain, and not be drawn out except for the purposes of his trade and sustenance, and for the purposes hereinafter mentioned, unless the said W. Pearce, W. Wells, and W. E. Heathfield, or any of them, shall in the mean time, for the benefit of the said parties hereto creditors of the said R. N. Collins, or of his estate and effects, otherwise determine; and that all and every sum or sums which shall for the purposes of these presents require to be taken out of such custody as aforesaid for the time being, shall be taken out by draft, authority, or order in writing, to be signed by the said R. N. Collins, and, if required, by the said W. Pearce, W. Wells, and W. E. Heathfield, or some or one of them.

"And it is hereby further declared and agreed by and amongst the parties to these presents, that it shall and may be lawful to and for the said W. Pearce, W. Wells, and W. E. Heathfield, some or one of them, by and out of the moneys which shall be deposited or paid in such custody as aforesaid, from time to time, and at all times, to deduct and reimburse themselves, and allow one another all costs, charges, and expenses which they or any of them shall sustain by reason or in consequence of these presents. And further, that it shall and may be lawful to and for the said R. N. Collins, by and out of the moneys aforesaid, to make the several deductions and payments in the order and manner hereinafter mentioned — that is to say, shall and may pay and satisfy the expenses of and relating to the investigation into the affairs of the said R. N. Collins, and of the preliminary arrangements with the creditors preparatory and leading to or of, and relating to the preparation and completion of these presents, and attending the execution of the trusts declared hereby; and in the next place shall and may pay and satisfy all sums of money which shall be requisite or necessary for carrying on the said trade or business of the said R. N. Collins, as aforesaid; and in the next place shall and may deduct, retain, and pay unto himself such monthly allowance, for his private use and maintenance, as the said parties hereto of the second part shall

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Want of space compels us to omit the arguments, but most of them are referred to in the judgments of the barons. *Phillips v. Sur-*

think reasonable and proper, and previously authorize; and, subject to the payments aforesaid, shall and may from time to time pay to any creditor of the said R. N. Collins, whose debt shall not amount to more than the sum of 5*l.*, either the whole amount thereof, or such composition thereon as they, the said parties hereto of the second part, may deem advisable and prudent, without his becoming a party to these presents, and then apply the residue of the said moneys so as to secure, pay, and satisfy the sum of 6*s.* 8*d.* in the pound, upon or in respect of the several debts now due or owing from the said R. N. Collins to the several persons parties hereto of the second and third parts, in manner following — that is to say, as to part thereof, the sum of 4*s.* in the pound upon the amount of the said respective debts, on or before the 28th of February, 1851, and the sum of 2*s.* 8*d.*, residue of the said sum or composition of 6*s.* 8*d.*, in the pound, on or before the 26th of February, 1852: provided always, and it is hereby declared and agreed, that no creditor or creditors of the said R. N. Collins shall be entitled to receive or be paid any part of the said composition or sum of 6*s.* 8*d.* in the pound, under or by virtue of these presents, notwithstanding his or their having executed these presents, who shall refuse or decline, upon being required by the said W. Pearce, W. Wells, and W. E. Heathfield, or some or one of them, so to do, to make a declaration in writing, before a competent magistrate, of the amount, validity, and nature of his or their debt, and of the security or satisfaction given, taken, and received, and then or at any time held in respect of any such debt or debts, but in other respects it is the true intent and meaning hereof that the said creditor or creditors so refusing as aforesaid shall be and continue bound and concluded by the provisions herein contained: provided always, and it is hereby further declared and agreed by and between all the said parties hereto, that it shall and may be lawful to and for the said W. Pearce, W. Wells, and W. E. Heathfield, at any time hereafter during the term aforesaid, or at the expiration thereof, to make sale and dispose of the stock and effects of the said R. N. Collins, and the business and good will thereof, if a sufficient sum can be obtained for the same, to realize, clear of all deductions for expenses attending the execution of the trusts contained in these presents and the said sale, to the creditors of the said R. N. Collins the said sum or composition of 6*s.* 8*d.* in the pound, or so much thereof as, at the time of such sale, shall or may remain unpaid; and that the said R. N. Collins shall and will at all times use his best endeavors to find a purchaser for the same, and either alone or jointly make, do, and execute all such acts, deeds, matters, and things as may be necessary and proper, and shall be required of him, for giving effect to such sale, according to the true intent and meaning of this present stipulation and agreement.

“And it is hereby further declared and agreed, that after full payment, satisfaction, and discharge of the said sum or composition of 6*s.* 8*d.* in the pound upon all and singular the aforesaid debts, and of all the costs, charges, and expenses occasioned by or attending the execution of the trusts declared by these presents, the said W. Pearce, W. Wells, and W. E. Heathfield, shall and do pay over the surplus of the said trust moneys unto the said R. N. Collins, his executors or administrators, for his and their absolute use and benefit, or as they shall direct or appoint. And it is hereby further declared and agreed by and between the said parties hereto, that the said several persons parties to these presents of the second and third parts shall and will, when and so soon as they shall receive respectively full payment or satisfaction of the said sum or composition of 6*s.* 8*d.* in the pound upon the amount of their said respective debts, execute and deliver unto the said R. N. Collins, his executors or administrators, a good and sufficient release, or good and sufficient releases, of, from, and against all claims and demands for or on account of the said several debts so due and owing to them, the said several persons parties hereto of the second and third parts as aforesaid, and all actions, suits, or other proceedings in respect thereof; and each of them, the said W. Pearce, W. Wells, and W. E. Heathfield, separately, for himself, his heirs, executors, and administrators, and as to his own acts and defaults only, but not further or otherwise, doth hereby covenant, promise, and agree with and to the said several and respective persons parties hereto of the third part, their several and respective executors and administrators, that they, the said W. Pearce, W. Wells, and W. E. Heathfield, and the survivor and survivors of them, shall and will duly perform

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ridge, 19 L. J., C. P., 337, and *Stewart v. Collins*, 20 L. J., C. P., 79; s. c. 2 Eng. Rep. 322, were cited.¹

POLLOCK, C. B. Our judgment must be for the plaintiff. The argument of Mr. O'Malley is this: I desire to give the fullest effect to

and execute the trusts and directions aforesaid, and from time to time, and at any time, at the request in writing of any five of the said creditors whose debts shall amount in the aggregate to 300*l.* at the least, render and give unto the parties hereto of the third part, or any five of them, their or any of their executors, administrators, and assigns, a full, true, and particular account and statement, in writing, of all their respective receipts, payments, and transactions, in pursuance of the trusts and directions aforesaid, or otherwise concerning the estate, property, and concerns of the said R. N. Collins, and of the state of the said trust property, and the affairs of the said R. N. Collins, with all proper vouchers for or relating to the same: provided always, and it is hereby declared and agreed, that each of them, the said W. Pearce, W. Wells, and W. E. Heathfield, and their respective heirs, executors, and administrators, shall not nor will at any time or times hereafter be liable or charged or chargeable with, for, or in respect of any of the acts, deeds, receipts, neglects, or defaults arising out of any of the trusts, matters, or things hereinbefore declared or contained, made, done, received, committed or omitted by the other or others of them, but solely with, for, and in respect of his or their own actual acts, deeds, receipts, neglects, or defaults, and not further or otherwise; and provided always, that in case all, or any, or either of the said parties hereto of the second part, or any future inspector or inspectors, shall be desirous to resign his or their office or offices of inspector or inspectors, it shall be lawful for him or them so to do, on giving notice in writing to that effect, to a meeting of the creditors of the said R. N. Collins to be called for that purpose, and any inspector or inspectors so giving such notice shall thereupon cease to be an inspector or inspectors; and the said creditors shall, if they think proper, elect another or other inspectors in the room or place of him or them so retiring; and the retiring inspector or inspectors shall, if required so to do, assign and convey, or join in assigning and conveying, the trust premises, powers, and authorities hereby vested in them, or the said creditors shall be at liberty to leave the winding up of the matter to the inspector or inspectors who shall not have so resigned. In witness whereof," &c.

¹ The Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, is divided, by the legislature itself, into several parts or heads, each consisting of a number of sections, with a sort of special title to each head. The present case depends on the 33d, 34th, and 35th of these heads; the first of which comprises the sections from 211 to 223, both inclusive, and is entitled "With respect to arrangements between debtors and their creditors under the superintendence and control of the court."

By sects. 211 and 212, every trader (i. e., every trader subject to the operation of the bankrupt laws — see sect. 65) unable to meet his engagements with his creditors may petition the court for protection, such petition to be supported by affidavit; on which the Court of Bankruptcy shall, by sect. 213, appoint a private sitting and an official assignee.

The 214th section then enacts, "that such petitioning trader shall, ten days before the day appointed for the private sitting of the court, file in court, and in such form as may by any rule or order to be made in pursuance of this act be directed, a full account of his debts, and the consideration thereof, and the names, residences, and occupations of his creditors, and also a full account of his estate and effects, whether in possession, reversion, or expectancy, and of all debts and rights due to or claimed by him, and of all property, of what kind soever, held in trust for him, and shall therein set forth such proposal as he is able to make for the future payment or the compromise of such debts or engagements, and shall furnish the official assignee with a copy of such account."

Sect. 215. "That at the private sitting of the court appointed in manner hereinbefore mentioned, or at any adjournment thereof, the creditors shall prove their debts, (such proofs to be in all respects as proofs in bankruptcy,) and the petitioning trader shall attend, and make oath of the truth of the account filed by him, and may be examined thereon; and if at such sitting, or at any adjournment thereof, three fifths in number and value of the creditors who have proved debts to the amount of 10*l.* shall

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it. He says, that as by the 214th section of this statute the petitioning trader may set forth such a proposal as he is able to make for the future payment or the compromise of his debts and engagements, and by the next section the assent of three fifths in number and value of his creditors who have proved debts to the amount of 10*l*. will be

assent to the proposal of such petitioner, or to any modification thereof, the court shall appoint another private sitting for the confirmation of such proposal or modified proposal, and such second sitting shall be held not earlier than fourteen days from the first sitting," &c.

Sect. 216. "That at such second sitting, or at any adjournment thereof, the creditors may also prove their debts, and if three fifths in number and value of those who have proved debts to the amount of 10*l*. shall agree to accept such proposal as was assented to at the first sitting, the terms thereof shall be reduced into writing, and the creditors shall sign the same; and such resolution or agreement (subject to such confirmation as is hereinafter mentioned) shall thenceforth be binding and of full force, as well against such petitioning trader as against all persons who were creditors at the date of his petition, and who had notice of the said several sittings of the court; and the court, if it shall think the same reasonable and proper to be executed, after hearing such creditors, by themselves, their counsel or attorneys, as may desire to be heard either for or against such resolution or agreement, shall approve and confirm the same, and cause it to be filed and entered of record, and shall grant to the petitioner a certificate of the filing and entering of record of such approval and confirmation, and shall from time to time indorse on such certificate a protection from arrest; and such petitioner shall be free from arrest at the suit of any person being a creditor at the date of his petition, and having had such several notice or notices as aforesaid; and any officer arresting such petitioner at the suit of any such creditor, and on sight of such certificate and protection not releasing such petitioner, shall be liable to such penalty as is provided respecting bankrupts in the like case; provided, however, that no such protection shall be valid in favor of any such petitioner who shall be proved to have been about to abscond beyond the jurisdiction of the court, or who has concealed or is concealing any part of his estate or effects, nor against any creditor whose debt is not truly specified in the account filed by such petitioner, nor against any creditor whose debt has been contracted by such petitioner by any manner of fraud or breach of trust."

The 218th vests the estate of the trader in the official assignee, either alone, or, if required by resolution, jointly with any other person.

Sect. 221. "That so soon as the said resolution or agreement shall have been carried into effect, and the creditors of such petitioning trader shall have been satisfied, according to the tenor thereof, the court shall give to such petitioner a certificate under the hand and seal of the commissioner in the form contained in the schedule A. c. to this act annexed, setting forth the filing of the petition, the resolution or agreement of the creditors, and that the said resolution or agreement has been fully carried into effect; and such certificate shall thenceforth operate to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy." [Here follow certain excepted cases.]

And by sect. 223, if the petitioning debtor do not attend the sittings of the court, &c., his petition may be dismissed, and if at the first sitting his proposal be not assented to, &c., the court may adjudge him bankrupt, and adjourn the proceedings into the public court, &c.

The 34th head of the statute comprises sects. 224-229, and is entitled "Arrangements by Deed."

Sect. 224. "That every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10*l*. and upwards, touching said trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of

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sufficient to render that proposal good and effectual, so when an arrangement by deed is entered into under the 224th section, without any application to the Court of Bankruptcy at all, that arrangement may be in the form contained in the deed now before us. He also contended, that as by the 230th section it is open to the insolvent trader, even after an adjudication of bankruptcy, to offer a composition to his creditors, and a composition even at that stage shall, if accepted by nine tenths in number and value of the creditors, be binding on all the rest, so a composition such as that in the present deed must be included in the operation of the 224th section. For the language of that section being that the creditors to the specified amount may by deed or memorandum enter into an arrangement "touching the liabilities of such trader, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto," which deed or memorandum of arrangement shall be effectual and obligatory upon all the creditors, though they may not have signed it, such an arrangement may be good wholly irrespective of its containing any provision for the distribution of the assets of the

arrangement as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy," &c.

Sect. 225. "That no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the court an order or certificate of the said court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the court, within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment, to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate as aforesaid shall be bound thereby."

By sect. 226, the trustee or inspector under any such deed or memorandum of agreement, or if there be no such trustee, &c., any two of the creditors, may certify to the court as to the proper number of creditors having signed, &c.

The 228th section enacts, *inter alia*, that "joint and separate assets shall be distributed in like manner as in bankruptcy," &c.

The 35th head of the statute is entitled "With respect to composition after adjudication of bankruptcy," and consists of the 230th and 231st sections; by the former of which it is enacted, "that any bankrupt, at any time after he shall have passed his last examination, may call a meeting of his creditors, (whereof, and of the purport whereof, twenty-one days' notice shall be given in the London Gazette,) and if the bankrupt or his friends shall make an offer of composition, and nine tenths in number and value of the creditors assembled at such meeting shall agree to accept the same, another meeting for the purpose of deciding upon such offer shall be appointed to be holden, whereof such notice shall be given as aforesaid, and if at such second meeting nine tenths in number and value of the creditors then present shall also agree to accept such offer, the court shall and may, upon such acceptance being testified by them in writing, and upon payment of such sum as the court shall direct, annul the adjudication of bankruptcy, and supersede or dismiss the fiat or petition for adjudication, and every creditor of such bankrupt shall be bound to accept of such composition so agreed to."

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trader among his creditors. I presume, also, that Mr. O'Malley will argue that the answer to what I put to him during the argument as an objection to this construction, namely, that it is enacted by the 228th section that on such arrangement by deed "joint and separate assets shall be distributed in like manner as in bankruptcy," is, that those words must be taken to apply to those cases only where the arrangement entered into is such as to require a distribution to be made, but that where the arrangement entered into is such as to require no distribution, and is confined to a mere composition, this 228th section does not apply at all. And with respect to the difficulty arising from the 230th section, that it speaks of a "composition" with creditors, while the 224th section does not use the word at all, thus showing that the legislature were alive to the distinction between composition and distribution, and that the creditors who have accepted the former have nothing to do with any surplus that may afterwards arise, I presume Mr. O'Malley would say, that under the 230th section nothing but composition is intended, but that under the 224th section composition as well as division under the deed of trust is intended.

I have thus endeavored to state what I consider to be the substance of an argument which I am by no means prepared to say is not entitled to some weight. Looking however to the whole scope of this act of Parliament, I am of opinion that this 224th section and all the other sections which relate to arrangements by deed between the insolvent and his creditors, contemplate a distribution among them of the assets of the insolvent. It is perfectly true that the proposal which the trader is empowered to make by the 214th section, and its acceptance by the creditors, is in effect a composition; but I presume what is there meant is a composition with payment at once. It therefore appears to me that the true construction of the 224th section is, that if there is to be an arrangement by deed a distribution must be made of the whole estate of the insolvent, and consequently that any deed under that section which gives to the trader the surplus beyond a certain amount in the pound to each creditor is invalid; that by entering into such a deed the assenting creditors have done what was *ultra vires* — something far beyond what six sevenths of the creditors have a right to stipulate for. I also find this clause in the deed, that if any of the creditors executing the same "shall sue, arrest, prosecute, molest, attach, detain, take in custody or execution, imprison, or otherwise impede or incumber" the insolvent, "contrary to the true intent and meaning of these presents, this present letter of license shall operate to all intents and purposes, and may be pleaded in bar to the said respective debts, and to any prosecution, suit, action, or other proceeding, &c., as effectually as if he had a general release under the hands and seals of such creditors respectively for that purpose." The creditors may enter into an arrangement with the insolvent, but I doubt much if they have a power to legislate; and any arrangement they make must be in accordance with the general rules of law. Now the 228th section seems to override the preceding ones in this respect, and is quite clear and distinct

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that there is to be a distribution of the joint and separate property of the trader; and this construction will carry out the object of such arrangements by deed, which was to avoid the inconveniences of a bankruptcy and facilitate the distribution of the property. For these reasons it appears to me that this deed is not a sufficient bar to the plaintiff's demand, and consequently that he is entitled to our judgment. I cannot, however, express this my opinion without adding that, both in my judgment and in that of the rest of the court, the plea in this case must be amended at all events; for it is certainly imperfect in this, that it alleges the defendant to have been for *six months* and upwards, before his suspension of payment, a trader liable to the bankrupt laws. Now six months must be taken to mean lunar months; whereas the interpretation clause of this statute (sect. 276) enacts that the term "month" when used in it shall mean a calendar month. As I have already observed, I am by no means prepared to say that the arguments brought before us by Mr. O'Malley are without weight. There is something to be said on the subject: but if the intention of the framers of the statute were such as he contends for, they have not expressed it.

ALDERSON, B. I am of the same opinion. Under the clauses of this statute which provide for arrangements between debtors and their creditors under the superintendence and control of the Court of Bankruptcy, it is clear that the debtor can make any proposal which he may think proper for the future payment or compromise of such debts or engagements as he may have: if that proposal is assented to by three fifths of the creditors who have proved debts to the amount of 10*l.*, provided however that that assent is confirmed by them at a second sitting, and also by the court, who are to see that the proposal is a fair one, it becomes binding on all the creditors of the trader, and is in truth a composition under the direction of the Court of Bankruptcy. Then come the clauses of the act which provide for arrangements by deed, when the matter does not come under the superintendence and control of the Court of Bankruptcy. It is very reasonable when the matter is carried on under that superintendence and control that the assent of three fifths of the creditors should give the court jurisdiction to act as they think fit, and dissenting parties be bound by the act of the assenting ones, when it is confirmed by the court, which will take care to see that it is consistent with justice and a proper disposition of the assets. But when you come to the case where the creditors whose debts amount to 10*l.* and upwards can by themselves enter into an arrangement binding all the creditors under 10*l.*, we ought to watch very carefully that distribution shall be made of the whole of the man's estate among the creditors; and it becomes a proper and reasonable construction of the act to hold that every such arrangement should contain a provision for such distribution. And this I think will be found to be the meaning of the words used by the legislature, for we must give the legislature credit for an intention to do what is right and just. They say, in sect. 224, "Every deed or memorandum of arrangement now or hereafter

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entered into between any such trader and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10*l*. and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly assigned the same," &c. It seems to me that all we have to do is to say that the words "his estate" in this section mean *the whole* of his estate; the creditors are to inspect the whole, to conduct the whole, to manage the whole of his estate, and provide a mode of winding it up, but still in such a way as to distribute the whole of it. By the deed before us, six sevenths of the creditors agree to allow the other things to be done which are pointed out in this section; and then they agree to distribute 6*s.* 8*d.* in the pound on the debt of each creditor, giving away the surplus to the insolvent, though he might be able to pay 20*s.* instead of 6*s.* 8*d.* in the pound. Is it reasonable that we should put a construction on the statute which would lead to such an absurdity, especially when we find in the 228th section an express provision that on such arrangements by deed the assets of the trader "shall be distributed in like manner as in bankruptcy"?

PLATT, B. I am of the same opinion. Several sorts of proceedings are contemplated by the Bankrupt Law Consolidation Act. One is the ordinary course of taking his money from the bankrupt by hostile means. In the second, the trader is allowed to make himself a bankrupt. But it is not every man who may be in insolvent circumstances that is empowered to do so, for the 93d section is, "that any trader liable to become bankrupt may petition for adjudication of bankruptcy against himself; provided always, that unless such trader shall forthwith, after the filing of his petition, and before adjudication of bankruptcy thereunder, make it appear to the satisfaction of the court that his available estate is sufficient to pay his creditors at least 5*s.* in the pound clear of all charges (to be estimated by the court) of prosecuting the bankruptcy, such petition shall be dismissed," &c.; the object being to meet the expense of putting in operation the machinery for making the man bankrupt. Then the statute contemplates another mode, which it denominates "arrangements between debtors and their creditors under the control and superintendence of the court;" where the insolvent, provided he can obtain the consent of a certain number of his creditors, a lesser number than required by the 224th section on which the present case depends, is enabled to proceed in a certain way for the purpose of an arrangement of his affairs. But that proceeding is entirely under the control of the court; and although less expensive than a regular bankruptcy, it is impossible not to see that where the control of the court is to take place at all, it must at every step be productive of some expense. Is it not reasonable to say

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that the 34th head of this statute, which provides for "arrangements by deed," was inserted with a view to avoid even that expense? And accordingly we find it enacted by sect. 224, that "every arrangement entered into between any such trader" (I take that to mean such a trader as is "incapable of meeting his engagements," a modern phrase used instead of the old Saxon one of "not being able to pay his debts") "and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10*l*. and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto" — not one syllable about composition — "shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly signed the same." If the argument of the defendant in this case is to prevail, see what would follow. Imagine a trader having one creditor to the amount of 100*l*., and several others of 9*l*. each, the debt of the former being six sevenths of all the debts, and he being the only creditor above 10*l*., he might make an arrangement with the trader to take five farthings in the pound in lieu of all debts, though the man might be perfectly solvent, and all the other creditors would be thus cheated out of their money. It never could have been the intention of the legislature to give the persons managing the insolvent's estate the same powers as are possessed by the Court of Bankruptcy; or that while in proceedings under the former heads of this statute a check is imposed on their conduct, here is to be no check at all, and those parties could act as a court without being subject to the general control of the Court of Bankruptcy. But the language of the different sections of the statute prohibits this construction; and when in particular we look at the 228th, it is impossible to imagine that the legislature contemplated any thing short of the distribution of the whole of the estate. And with good reason, for a man in embarrassed circumstances ought to distribute his estate among his creditors, as was held in a case in *Maule & Selwyn*; so that a deed to carry that object into effect may well be treated by the statute as a favored case, which accordingly leaves to the creditors to make that distribution, subject however to the control of the court, and in the manner pointed out by the 228th section. It is true, indeed, that the 225th provides for interference by the Court of Bankruptcy; but that interference is not to alter the arrangement at all, and is only for the purpose of ascertaining that what has been agreed on is carried into effect; all the rest is left to the trustees, who have the management and control of the property. Moreover, it appears from the 230th and some other sections of the statute, that the legislature contemplated compositions after adjudication of bankruptcy, and requires such to be entered into by nine tenths in number and value of the creditors, a greater proportion no doubt than contemplated by the present part. It therefore seems to me that the ordinary composi-

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tion deed has nothing to do with the statute; it remains where it was before the statute passed, i. e., it binds those executing it and none beyond, and consequently, if a man makes such an agreement as this with his creditors, he remains liable to be sued by all of them who have not signed it.

MARTIN, B. The effect of this plea is, that the plaintiff's debt was extinguished by the execution of a deed by certain other creditors of the defendant; and it is perfectly clear that no such extinguishment could take place except by operation of the statute; which must be looked at, not with a view to the interests of the one side or of the other, but in order to ascertain its real meaning. By the statute, a certain number of his creditors are entitled to deal with the liabilities of the trader, relieve him from them, and distribute his property; but to enable this to operate on the rights of third parties, they must, as it appears to me, deal with the estate with a view to distribution, and it is not competent for them to make no distribution among the creditors and give a portion to himself. I think it perfectly clear that is the meaning of the statute. By the 224th section, on which Mr. O'Malley relies, the deed is to be one "touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto;" and Mr. O'Malley argues, that those words would be satisfied if the deed related simply to the liabilities and release of the trader; and consequently that it would be competent to six sevenths of the creditors to release him from all liability. But such a construction is repugnant to the statute itself, as well as to common sense and understanding, for it would make an instrument executed by one man obligatory on another. And this is what Wilde, C. J., meant in *Phillips v. Surridge*, when he said that the largest discretion is given to the creditors. So it is as to managing, winding up, &c.; but it is on the footing that the assets be distributed. Mr. O'Malley further says, that by the 225th section a superintending power over these deeds is vested in the Court of Bankruptcy. I think, however, that the order or certificate there spoken of is only to testify that such a thing has been duly signed; and that the only matter (as it strikes me) into which the court has to inquire is, ay or no, have six sevenths of the creditors signed the deed? It has already been mentioned that the construction contended for by the defendant is at variance with the 228th section, which says that a distribution of the assets is to be made as in bankruptcy — a provision utterly inconsistent with giving a portion to the creditors and the rest to the trader. The defendant has therefore failed in making out that this deed operates so as to defeat a stranger and extinguish his debt. But I was much struck with the observation of my lord chief baron, that where the legislature in another part of this statute mean a composition to be effective, they say so.

It was then agreed that O'Malley should be at liberty to apply at chambers for leave to amend, otherwise

Judgment for the plaintiff.

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HESLOP v. BAKER & others.¹

Trinity Vacation, July 10, 1851.

Bankruptcy — 12 & 13 Vict. c. 106 — Reputed Ownership.

Under the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, goods and chattels in the reputed ownership of a bankrupt do not pass to his assignees by the adjudication of bankruptcy under sect. 141: in order to divest the bankrupt's property in such goods, the Court of Bankruptcy must make an order to sell and dispose of them under the 125th section: *per curiam*; *dubitante*, Platt, B.

Quere, whether such an order is final and conclusive in a court of law, where the claimant of the goods does not petition under sect. 12.

THIS was an action of trover against Baker and two others; to which the defendants pleaded the general issue, and that the plaintiff was not possessed of the goods, &c. At the trial, before Cresswell, J., it appeared that the property, in respect of which this action was brought, had been assigned some years since to the plaintiff by one James Allman, as a security for certain alleged advances, but had been suffered to remain in the possession of Allman as apparent owner thereof. In the autumn of 1850, Allman committed an act of bankruptcy, and the plaintiff, with knowledge of that fact, took possession of the property. In the month of September, in that year, Allman was adjudged bankrupt, and the defendants appointed his assignees, who on the 7th of October took possession of the property, as goods in the order and disposition of the bankrupt within the meaning of the 125th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. On this state of facts, it was objected by the plaintiff's counsel, that under that statute property of which a bankrupt is the reputed owner does not vest in his assignees by their appointment, and that to enable them to deal with it an order of the Court of Bankruptcy must be made under the 125th section. The judge however told the jury, that the defendants were entitled to their verdict if they thought that the goods remained in the order and disposition of the bankrupt at the time of his bankruptcy with the consent of the plaintiff, and that he knew of the act of bankruptcy before he took possession. The jury having found for the defendants, —

Bliss, in Easter term, obtained a rule for a new trial on the ground of misdirection. This rule was argued at the present sittings on the 21st and 23d of June, when

Watson, *Asherton*, and *H. Hill* showed cause; and

Bliss was heard in support of it.

The following statutes and authorities were referred to during the argument: 13 Eliz. c. 7. 1 Jac. 1, c. 15. 21 Jac. 1, c. 19. 5 Geo.

¹ 15 Jur. 684.

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2, c. 30. 6 Geo. 4, c. 10, s. 63, 71, 72, 73. 7 Geo. 4, c. 57, s. 19, 30. 1 & 2 Vict. c. 110, s. 57. 1 & 2 Will. 4, c. 56. 12 & 13 Vict. c. 106, s. 121, 122, 123, 125, 126, 127, 141. *Crisp v. Pratt*, Cro. Car. 548. *Ryall v. Rolle*, 1 Atk. 164; 1 Ves. Sen. 348. *Lilly v. Osborn*, 3 P. Wms. 298. *Kitchen v. Bartsch*, 7 East, 53. *Kensington v. Chantler*, 2 Man. & G. 36; and the forms of assignment in various treatises on the bankrupt laws.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B., (after stating the facts.) The question in this case depends entirely upon the construction of the Bankrupt Act, 12 & 13 Vict. c. 106, s. 125, 141.

If this were an entirely new statute upon a subject with respect to which no previous enactments had existed, there could not have been a question but that the bankrupt's own personal estate, present and future, would have vested in the assignees upon his being adjudged a bankrupt under the 141st section; but that goods in his order and disposition, under sect. 125, lands and goods previously transferred when the bankrupt was insolvent, under sect. 126, real or personal estate extended by a fraudulent extent, under sect. 127, would not pass by the adjudication, but an order of the court would be required to sell and dispose of them before any one else than the bankrupt could have any title in them. This is the construction that would be required by the plain unequivocal language of the statute.

But it is contended, on the part of the defendants, that the new Bankrupt Act is not to be construed as an entirely new act, but as a consolidation of previous statutes, which are repealed and reënacted; that the whole is to be construed with reference to the old law, and the reënacted clauses understood in the same sense as they were before; and that, if so, the 141st section would give the adjudication the effect of passing not only all the property which belonged to the bankrupt, but all of which he was in possession as reputed owner.

We, however, think, after much consideration, my brother Platt still entertaining some doubt upon the point, that construing this act of Parliament with reference to the repealed enactments, it is impossible to give that effect to the 141st section in this act.

The state of the law before the passing of the act, the 1 & 2 Will. 4, c. 56, s. 25, (repealed and reënacted by the new Bankrupt Act,) as to the transfer of property from the bankrupt, was this:—

By the stat. 13 Eliz. c. 7, s. 1, the commissioners sold or assigned a portion of the bankrupt's estate to each creditor.

By the 1 Jac. 1, c. 15, s. 5, they had the like power as to lands or goods conveyed without consideration by the bankrupt to his children, or others.

By the 51 Jac. 1, c. 19, s. 10, they had the same power where a bankrupt had his estate extended by another under color of that person being an accountant to the crown, that power to be exercised after examination on oath; and by the 11th section they have the

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like power, without any such previous examination, over goods and chattels in his possession as reputed owner.

By the 6 Ann. c. 22, s. 4, a temporary act,¹ general assignees were directed to be appointed for the benefit of the creditors, and the commissioners were to assign all the bankrupt's estate and effects to those persons only. After that act expired, the 5 Geo. 2, c. 30, containing a similar provision, (sect. 26,) was passed, and afterwards that act was repealed, and a like provision reenacted by the 6 Geo. 4, c. 16, s. 63, extending, in words, to all the present and future personal estate of the bankrupt, which, by construction, the general assignment had been considered to do before; and by the 72d section the commissioners had power to sell and dispose of for the benefit of the creditors the goods and chattels in the bankrupt's reputed ownership; and a similar power by sect. 73, as to lands or goods conveyed to his children or others without consideration, with the additional limitation that he should be then insolvent; and by sect. 71, after examination on oath, a similar power is given as to lands or goods fraudulently extended.

As the law stood after that act, there is no doubt that the commissioners could assign the goods and chattels in the possession and reputed ownership of the bankrupt, by virtue of the 72d section, and the personal estate mentioned in the 73d, by one general assignment to the assignees; and none that the former at least passed by an assignment, which "ordered, disposed, bargained, sold, assigned, transferred, and set over, all *the* goods, chattels, and other personal estate whatsoever and wheresoever, whereof the bankrupt was possessed, interested in, or entitled unto, at the time he became bankrupt, or at any time since." This is the form given in Deacon's Bankrupt Law, vol. 2, p. 195, ed. 1827; and Cooke's Bankrupt Laws, vol. 2, p. 63, ed. 1823: that given in Cooke's Bankrupt Laws, vol. 2, p. 53, as a form of *provisional* assignment, contains only an assignment of *the bankrupt's* estate. The object of such an assignment being only to defeat an extent, which could not apply to the goods of *others* in his reputed ownership, the difference probably arose from that cause.

At a time prior then to the 1 & 2 Will. 4, c. 56, s. 25, there is no question that the general assignment operated to vest in the assignees goods in the reputed ownership of the bankrupt. When that statute had passed, it is a question whether such goods did pass by the adjudication by virtue of the 25th section. That section provides that "when any person hath been adjudged a bankrupt, all *his* personal estate and effects, present and future," (not *the* personal estate, &c.,) "which by the laws now in force *may be* assigned by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested in, and transferred to, the assignees, by virtue of their appointment, without any deed of assignment, as if *such* estate were assigned by deed to such assignees and the survivor." On the one hand, the language of the former part of the section

¹ The statute books in ordinary use only give the title of this act, and describe it as the 5 Ann. c. 22.

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appears to apply to the bankrupt's own property only; on the other, the words "which by the laws now in force *may* be assigned by commissioners" may give the former words a more extensive operation.

In a note on this statute by Messrs. Koe & Miller, in their edition of Montague & Ayrton's Bankrupt Law, vol. 2, p. 230, it is said that neither the property mentioned in the 71st section, nor that in the 72d section of the 6 Geo. 4, c. 16, (goods in the possession and reputed ownership,) vests in the assignees by the adjudication. If this be so, no question could possibly arise in this case, for a similar construction would have to be made of the 141st section of the 12 & 13 Vict. c. 106, which would pass only the bankrupt's own personal estate, by its proper description of *his* personal estate and effects. But supposing it to be otherwise, and that by a liberal construction of the 1 & 2 Will. 4, c. 56, s. 25, it ought to be held that the words "his estate" comprised all the estate which by the laws then in force might be assigned by the commissioners to the assignees, and consequently that property in the reputed ownership of the bankrupt did vest under that statute, it by no means follows that it could pass under the 141st section of the new Bankrupt Act, even if it stood alone; for in this section we do not find the only words which might enable us to give a more extensive signification to the words "all *his* estate," that is, the words "*which by the laws now in force may be assigned by commissioners,*" under which words it may be supposed that the legislature meant to comprise *all* that could be assigned — these words are omitted. And we find that, in the same act of Parliament, the 72d section of the 6 Geo. 4, c. 16, is reenacted, with this alteration only, that instead of the commissioners having power to sell and dispose of the same, that is, practically to assign them to the assignees, *the court* has power, not to sell and dispose of, but to *order* them to be sold and disposed of.

We think that the meaning of these enactments in the new statute is, that, in the case of the bankrupt's own property, it is to pass by the adjudication, but in the case of chattels in his reputed ownership something different must be done, and the court must make an order to sell and dispose of the same, in order to divest the property from the bankrupt.

It was justly observed by Mr. Bliss, that there is a general heading to this 125th and two following sections — "*With respect to the power of the court over certain descriptions of property*" — in all of which a power to order and dispose of is given by express words; and it may be added, that as to the property mentioned in the 127th section, it is impossible it could pass by the adjudication, for the court must *first* examine on oath as to the debt due to the accountant before they can make the order. Taking all the clauses together, and acting upon the sound and established rule of construing statutes and all written instruments, i. e., according to the ordinary and grammatical sense of the words used, unless it would lead to some absurdity or inconsistency with the intent of the framers, to be collected from the whole of the instrument and other legitimate grounds of construction, we, except my brother Platt, do not feel any doubt that the

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goods in question did not pass simply by the adjudication. There is no absurdity, or inconsistency, or inconvenience in holding that an order is necessary in such a case ; when issued, the title of the vendee if the goods are sold, of the assignees if the order is to vest the goods in them, will relate to the act of bankruptcy, in the same way that the title of the assignees does by the general assignment ; for all will be sold or assigned which the bankrupt had at the time *he became bankrupt*.

Whether this state of the law arises from a mistake in the framer of the act, or was intended, is a matter of mere conjecture. *Possibly* it may have been a mistake in making these enactments in the terms used, but of the meaning of the terms used, there is, in the opinion of all of us, except Baron Platt, no doubt, and according to the words of the enactment it is clear that the goods in question do not pass by the adjudication. If the court makes the order to sell or vest in the assignees, a question may arise whether that will be final and conclusive, by virtue of prior sections, in cases where the claimant of the goods does not petition under sect. 12, and consequently not to be questioned in a court of law. Upon this point it is unnecessary to give any opinion.

We think, therefore, that the rule must be absolute for a new trial ; and if it become necessary, the defendants may tender a bill of exceptions if they should think fit.

Rule absolute.

CROWN CASES

RESERVED

FOR THE CONSIDERATION

OF THE

COURT OF CRIMINAL APPEAL;

DURING THE YEAR 1851.

[Before LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J., PLATT, B., and
TALFOURD, J.]

REGINA v. BENNETT.¹

April 26, 1851.

Perjury — Materiality of Averments in Indictment.

In an indictment for perjury, it was alleged to be a material question whether or not the prisoner ever got "one Milo Williams" to write "a letter" for her; and in the averments, negating the truth of what was sworn, the indictment alleged, that, "in truth and in fact, the said Mary Ann Bennett did get the said Milo Williams, and that when on her cross examination at the trial, when the alleged perjury was committed, she was asked whether she had ever got 'a Mr. Milo Williams' (who was then pointed out to her in court) to write a letter for her :"—

Held, that the averments in the indictment were sufficient, without any allegation connecting the "one Milo Williams" named in the allegations of materiality, and the averments negating the truth of what was sworn, with the "Mr. Milo Williams" named in the subsequent part of the indictment.

MARY ANN BENNETT was tried, before Talfourd, J., at the last assizes for the county of Gloucester, on an indictment charging her with wilful and corrupt perjury, committed on the trial, at the Gloucester Spring assizes, 1850, of Shadrach Lewis and Isaac Hopkins, for a rape upon herself. The indictment against Mary Ann Bennett, after stating the trial and the oath taken by the prisoner as a witness, in the usual form, proceeded thus to allege the materiality of the matters assigned as perjury, and the prisoner's evidence to which the assignments were applicable: "That upon the trial of the said indictment the following questions became and were material, and each of them respectively became and was a material question, whether or not the said Mary Ann Bennett ever got one Milo Williams to write a letter for her; and whether or not she, the said Mary Ann Bennett, saw the said Milo Williams at the house of the father

¹ 20 Law J. Rep. (n. s.) M. C. 217. 15 Jur. 497.

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of the said prisoner Shadrach Lewis when the said letter was written; and whether or not she ever saw the said Milo Williams at the house of the said father of the prisoner Shadrach Lewis; and whether or not she ever saw the said Milo Williams in any house; and whether or not she ever saw the said Milo Williams more than once; and whether or not the said Shadrach Lewis and the said Isaac Hopkins, or either of them, violently, feloniously, and against the will of the said Mary Ann Bennett, ravished her. That the said Mary Ann Bennett, being so sworn, &c., then and there, on the said trial, upon her oath aforesaid, falsely, corruptly, and wilfully, &c., did depose and swear, amongst other things, in substance and to the effect following; that is to say, that she (meaning the said Mary Ann Bennett) never got a Mr. Milo Williams (he, the said Milo Williams, being then present in court during the said trial) to write a letter for her, and that she (meaning the said Mary Ann Bennett) did not see the said Mr. Milo Williams at the house of the father of the said prisoner Shadrach Lewis when the said letter was written, and that she (meaning the said Mary Ann Bennett) never saw the said Mr. Milo Williams at the said house of the said father of the said prisoner Shadrach Lewis, and that she (meaning the said Mary Ann Bennett) never saw the said Milo Williams in any house, and that she (meaning the said Mary Ann Bennett) never saw the said Milo Williams more than once; and that the said Shadrach Lewis and Isaac Hopkins violently, feloniously, and against the consent of the said Mary Ann Bennett, ravished her."

The indictment then proceeded to negative the truth of the matters sworn in these terms: "Whereas, in truth and in fact, the said Mary Ann Bennett did get the said Milo Williams to write a letter for her," &c.; and concluded in the usual form.

It was proved that, at the trial of Lewis and Hopkins, the prisoner, then the witness, was asked, on her cross examination, whether she ever got Mr. Milo Williams (who was pointed out to her in court) to write a letter for her. That she replied, "No, I did not." That a letter was then exhibited to her, and the question was repeated as to "this letter." That she repeated her denial. She was then asked, "Did you not get Mr. Milo Williams to write this letter at Lewis's father's house?" She replied, "I did not." She was then asked, whether she ever saw Williams at Lewis's father's house. She said, "I never did." Again, whether she ever saw Williams. She replied, "Once at Chepstow; never but once." She was then further asked, whether she ever saw Williams at her father's house. She replied, "Not in any house." The questions were afterwards, in substance, repeated to her by the judge, but she persisted in the same denials. She deposed to the perpetration of a rape on her person by both prisoners in succession, each assisting the other. After the trial of the indictment for perjury, the letter in question, which had been given in evidence to contradict her on the trial for rape, was sworn by Milo Williams to have been written at the house of the father of Lewis, after the committal for rape, by himself, upon her suggestions, read over to her by him, signed by her with her mark, and by him

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taken away for transmission to Lewis in Gloucester jail. It was as follows :—

“ St. Briavall's Common, Jan. 4, 1850.

“ Shadrach Lewis, —

“ Dear Friend, — Your master, Mr. Milo Williams, called to see your father about your unfortunate situation. I have told him I will do all I can to clear you, and I am glad I was at your father's house when Mr. Williams called. I should not have went to the police about the matter at all if I had not been persuaded by Betty Wood and Nany Vine. I had too many backers, or I should not have troubled about it. If you are as willing as myself, when you return, I have no doubt all will be well as it was before. Your father is well.

“ I am yours, &c.,

“ MARY ANN ^{her} X BENNETT.
_{mark}

“ Witness — Milo Williams.”

Other confirmatory proof of the truth of Mr. Williams's statement was given, and the jury found the prisoner guilty on all the assignments of perjury except on that assigned on the allegation that she never saw Williams but once, (which there was no proof to negative,) and the assignment on the allegation of rape itself, the sufficiency of which, therefore, it is not necessary to consider. For the prisoner it was objected, that the materiality of the matters assigned as perjury was not sufficiently alleged in the indictment; that the reference to the letter was too vague and general, and not properly pointed to the particular letter in question; that the reference to Milo Williams, and to Lewis's father's house, was not properly introduced by an averment; that the letter produced in evidence was not sufficiently identified with the statements on the record to support them. It was also contended that the whole transaction of the letter was not sufficiently material to the charge of rape; but his lordship thought it clearly was so, under all the circumstances in proof before him, and he did not reserve this objection.

M' Mahon, for the prisoner. “ A Milo Williams ” must be taken to mean here any “ Milo Williams ; ” and “ a letter ” any letter; and it could not be material whether she got any Milo Williams to write any letter for her. It might be material whether she got a certain Milo Williams, who was pointed out to her when under examination, to write a particular letter of a certain import, which was then also shown to her, but not whether she got “ a Milo Williams,” whom she might not have known by name, and who was not pointed out to her, to write any letter of any purport whatever, which also was not particularly called to her attention by being read or shown to her.

[*Lord Campbell*, C. J. It is alleged and found to be material, and that is enough.]

No; the question of the sufficiency of the allegation of materiality

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is for the court; and if the court clearly sees that a matter which is alleged to be found to be material is not material, they will hold the indictment insufficient.

[*Alderson, B.* But this is alleged and found to be material, and nothing appears on the indictment from which we can see that it was not material. It might have been, under the particular circumstances of the case, very material whether she got any "Milo Williams" to write any letter for her.]

The next objection was, that there was nothing on the face of the indictment to identify "a Milo Williams," named in the allegation of materiality, and in the averments negating the truth of what was sworn, with "one Mr. Milo Williams," named in the allegations of what was sworn; but, on the contrary, the court must assume them to be different persons. The word "Mr." must now be taken, as the framer of the indictment alleged merely the "substance and effect" of what was sworn, to be either a Christian name or some designation of honor, something, at least, to distinguish "Mr. Milo Williams" from "a Milo Williams;" for if it were not so intended, the "Mr." would not have been inserted. Though "Mr. Milo Williams" was *then* in court, that was no identification of him. There were hundreds in court, no doubt, during the trial, and he was not, according to the indictment, pointed out from the crowd to the witness. The ordinary mode of alleging what was possibly intended to be alleged here was, in the allegation of materiality, to say that it was material whether she got "one Milo Williams, who was then in court, and was pointed out to her," to write a certain letter, &c., and afterwards to identify him, in the averments of what was sworn, by alleging that she swore that she did not get "the said Milo Williams, who was then in court, and was pointed out to her," &c. But nothing of this kind appeared in this indictment, and nothing whatever to show that the "Mr. Milo Williams, who was then in court," as to whom she swore, was the person with regard to whom it was material that she should swear. For aught that appears, though it may have been material that she should have sworn with regard to "a Milo Williams," it might have been utterly immaterial that she should have sworn with regard to "Mr. Milo Williams, who was then in court."

Powell, for the crown, was not called on.

LORD CAMPBELL, C. J. I do not see the ambiguity in the indictment that is contended for. The evidence abundantly proves that the writing of the letter was material, and the identity of Milo Williams is sufficiently sustained throughout the indictment.

ALDERSON, B. It is alleged that Milo Williams was the writer of the letter alleged to be material.

COLERIDGE, J. I am also of opinion that the indictment is sufficient. Perhaps it would have been better if there had been an allega-

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tion expressly connecting "Mr. Milo Williams" with the "one Milo Williams" who was alleged to have written the letter.

PLATT, B., and TALFOURD, J., concurred. *Conviction affirmed.*

[Coram LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J., PLATT, B., and TALFOURD, J.]

REGINA v. DAVIS.¹

April 26, 1851.

Indictment — Name of Prosecutor — Rule Idem sonans.

Where an indictment for larceny described the prosecutor as Darius C., and the prosecutor in evidence stated that his name was Trius C.:—

Held, that it was a question of fact for the jury, and not of law for the court, whether the two words were *idem sonantia*.

THE following is the substance of a case stated by the Court of Quarter Sessions for the county of Dorset:—

The prisoner, William Davis, was tried, at the Quarter Sessions for the county of Dorset, on the 31st of December, 1850, on an indictment which in one count charged him with stealing, and in another with feloniously receiving, knowing them to be stolen, certain goods and chattels, the property of "Darius" Christopher. On the trial, the prosecutor, Christopher, being asked what was his Christian name, said, "Trius." The counsel for the prisoner objected that the property was laid in the wrong person. The court overruled the objection, holding that according to the rule of law as to *idem sonans*, the proof was sufficient, as Trius and Darius, when pronounced, sounded the same. The prisoner was found guilty on the second count. The question for the court was, Are the words "Trius" and "Darius" pronounced so as to produce the same sound? If so, the conviction was to stand. If not, the prisoner was to be entitled to an acquittal.

The case was sent back for the chairman of sessions to state *whether it was left to the jury to decide* "if the two names sound alike, so as to designate the prosecutor and no one else, distinguishing him from all others." The chairman then stated, "I beg to state that, on my laying down the rule as to names being *idem sonantia*, and the court being of opinion that the names Darius (pronounced in the Dorset dialect D'rius) and Trius sounded alike, the case proceeded without its being either expressly or substantially left to the jury to decide as to the question of the names sounding alike; but the jury found their verdict upon the facts of the case, and the motion of counsel was in arrest of judgment."

¹ 20 Law J. Rep. (n. s.) M. C. 207. 15 Jur. 546.

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LORD CAMPBELL, C. J. This case was sent back, in order that it might be stated whether it was left to the jury to decide on the identity of the sound of the words "Darius" and "Trius." The chairman of the Court of Quarter Sessions in answer says, "I beg to state that on my laying down the rule as to names being *idem sonantia*, and the court being of opinion that the names Darius (pronounced in the Dorset dialect D'rius) and Trius sounded alike, the case proceeded without its being expressly or substantially left to the jury to decide as to the question of the names sounding alike." It seems to us quite clear that the conviction must be quashed. If two names spelt differently must necessarily sound the same, the judge, as a matter of law, may say that they are the same. But neither the Court of Quarter Sessions nor this court can be justified in taking upon themselves to say that in point of law Darius and Trius have the same sound.

The rest of the court concurred.

Conviction quashed.

[Before LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J., PLATT, B., and TALFOURD, J.]

REGINA v. POYSER.¹

April 26, 1851.

Larceny by Bailee — Determination of Bailment by tortious Act of Bailee.

The prisoner was employed by the prosecutor to sell clothes on commission. The prosecutor fixed the price of each article, and the prisoner was intrusted with the articles to sell at that fixed price, and he was to bring back the money or the goods if they remained unsold. The prisoner on one occasion took away a parcel of clothes on these terms, but instead of selling them he fraudulently pawned part and fraudulently applied the residue of them to his own use:—

Held, that there was but one bailment of all the separate articles forming the parcel; that the original bailment was determined by the unlawful act of pawning part of them; and that, consequently, the subsequent fraudulent appropriation of the residue amounted to a larceny.

THE following case was stated by Alderson, B.: The prisoner was tried before me, for larceny, at the last assizes (Spring assizes, 1851) for the county of Leicester. It appeared, at the trial, that the prisoner was employed by the prosecutor, who was a tailor, to sell clothes for him about the country, and upon the following terms: The prosecutor fixed the price of each article, and the prisoner was intrusted to sell them at that fixed price, and when he had done so was to bring back the money and the remainder of the clothes unsold, and was to have 3s. in the pound on the moneys received for his trouble.

¹ 20 Law J. Rep. (N. S.) M. C. 191. 15 Jur. 386.

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On the 12th of February last he took away a parcel of clothes upon these terms, but instead of disposing of them according to the above arrangement, he fraudulently pawned a portion of them for his own benefit, and having so done, he afterwards fraudulently appropriated the residue to his own use. These facts having appeared, I directed the jury that the original bailment of the goods by the prosecutor to the prisoner was determined by this unlawful act in pawning part of them, and that the subsequent fraudulent appropriation by the prisoner of the residue of the goods to his own use would, in point of law, amount to larceny. Upon this direction the prisoner was found guilty, and I desire the opinion of the judges upon the point whether this direction was right.

O'Brien, for the prisoner. The engagement between the prisoner and his employer resulted in a separate contract with respect to each article at a separate price, and not in one contract respecting the whole. The prisoner was a bailee in lawful possession of each and every article, and on a separate bailment as to each. It is not even found that the articles were given to him tied up together. By pawning some of the articles improperly, he did not destroy his lawful title as bailee in respect of the rest. His possession of the rest remained lawful. If after pawning part he had, in fulfilment of the original engagement with the employer, sold the remainder on his employer's behalf, he would only have been performing his duty as to those articles, and with respect to them his employer would have had no ground of complaint. The latter could not have maintained trover to recover them from a purchaser. The possession of the prisoner is very different from the case of a carrier who is intrusted with a parcel, for the carrier has no right to open the parcel; but here it was the duty of the prisoner to open the parcel and separate the articles, and to sell a part by themselves. The doctrine, therefore, respecting breaking bulk does not apply. Though the bailment be countermanded, yet, unless the owner resumes possession of the goods, a fraudulent appropriation of them does not amount to larceny. He referred to *The Queen v. Hey*, 1 Den. C. C. 602.

No counsel appeared for the prosecution.

LORD CAMPBELL, C. J. I am of opinion that this conviction is quite right. The question depends upon whether this was one bailment only, or whether there were several bailments. Had Mr. *O'Brien* succeeded in making out that there was a separate bailment of each article and not one bailment of them all, then the misappropriation of one article would not determine the lawful possession as to the others. But as I read the case, I can come to no other conclusion than that there was but one bailment; though the parcel, it is true, was composed of separate articles to each of which a separate price was affixed, still it seems to me that there was but one bailment of all. It has long been settled that when any tortious act determines the bailment, the subsequent appropriation of any part of the parcel amounts to larceny.

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ALDERSON, B. The facts showed that the goods were delivered in one parcel. I laid it down at the trial, and am of the same opinion now, that the first tortious act of the prisoner determined the bailment; consequently, that the subsequent appropriation by him of the remaining portion of the goods was a larceny.

COLERIDGE, J. The circumstance of there being a different price affixed to each article does not, I think, prevent the transaction being one simple bailment of the whole.

PLATT, B., and TALFOURD, J., concurred.

*Conviction affirmed.*¹

¹ It seems that where property is lawfully in the possession of a person, by consent of the owner, under a contract of bailment, such bailment must be determined, before a misappropriation of such property by the bailee will amount to larceny; and unless there has been some act determining the bailment, the mere sale of such property, by the bailee, will not, in itself, amount to larceny; *there being no felonious intent in the original taking.* *Rex v. Henry Levy*, 4 Carrington and Payne, 241. (1830.) *Rex v. Charles Smith*, 1 Moody, 473. (1836.) *Regina v. Charles Evans*, 1 Carrington and Marshman, 632. (1842.) *Rex v. Madox*, 1 Russell and Ryan, 92. (1805.) *Rex v. Fletcher*, 4 Carrington and Payne, 545. (1831.) *Rex v. Thomas*, 9 Carrington and Payne, 741. (1841.) *Regina v. William Thistle*, 1 Denison, 502. (1849.) *Regina v. George Hey*, 1 Denison, 602. (1849.) But see *Commonwealth v. Brown*, 4 Massachusetts, 580. (1808.) But if, as in this case of *Regina v. Poyser*, the bailment is first determined by the wrongful act of the bailee, and he subsequently converts the property, as where he breaks open the package or envelope containing the articles, or wrongfully disposes of a part of them, this amounts to larceny of the remainder. *Rex v. John Brazier*, 1 Russell and Ryan, 337. (1817.) *Rex v. Mary Ann Jones*, 7 Carrington and Payne, 153. (1835.) *Regina v. Stephen Jenkins*, 9 Carrington and Payne, 38. (1839.) *Cheadle v. Buell*, 6 Ohio, 67. (1833.) And this on the ground that by such prior tortious act, the bailment being determined, the property reverts constructively to the possession of the bailor, and the subsequent conversion becomes lar-

ceny. In *Commonwealth v. James*, 1 Pickering, 375, (1823,) this principle was applied to the case of a miller, who, having received a quantity of barilla to grind, fraudulently separated a part of it from the rest, which he appropriated to his own use; the fraudulent separation determining the contract, and the subsequent conversion of the part so separated amounting to larceny. In like manner, if a person having only the charge, care, and custody of property, but not the possession, as in the case of a servant with his master's property, converts the same, *animo furandi*, it is larceny; for in judgment of law the possession remains in the owner until conversion. *Rex v. Bernard McNamee*, 1 Moody, 368. (1832.) *Regina v. Jackson*, 2 Moody, 32. (1838.) *The People v. Call*, 1 Denio, 120. (1845.) *Regina v. Allen Goode*, 1 Carrington and Marshman, 582. (1842.) *Regina v. Beaman*, 1 Carrington and Marshman, 595. (1842.) *United States v. Clew*, 4 Washington, 700. (1827.) *State v. Self*, 1 Bay, 242. (1792.) And this where the goods stolen never were, in point of fact, but only constructively, in the possession of the master, as where property is sent to a master by the hands of a servant, which the servant converts to his own use. *Regina v. Watts*, 1 English, 558. (1850.) *Rex v. Harding*, 1 Russell and Ryan, 125. (1807.) *Rex v. Nicholas Abraham*, 2 Leach, 824. (1798.) *Rex v. John Spears*, 2 Leach, 825. (1798.) But see *Regina v. Orlando Masters*, 1 Denison, 332. (1848.) So if personal property is inadvertently left in the possession of a person, who subsequently conceals it, *animo furandi*, this is larceny. *The People v. McGarren*, 17 Wendell, 460. (1837.)

Regina v. Uezzell & others.

[Coram LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J., PLATT, B., and TALFOURD, J.]

REGINA v. UEZZELL & others.¹

May 3, 1851.

Night poaching — Indictment — Land — Close.

If persons to the number of three or more are together in one party armed, by night, in any land for the purpose of destroying game there, and the land consists of several closes, and one of such persons be in one close and another in a different close of the land, they may be convicted under the stat. 9 Geo. 4, c. 69, s. 9. The conviction will not be affected by the circumstance that one of the closes is an enclosed field and another an open waste, and that each is in the occupation of different tenants.

PARKE, B., stated the following case for the opinion of the judges:—

The prisoners, Uezzell, Parkins, and Eaton, were tried, before me, at the last assizes for Hertford, (Spring assizes, 1851,) for night poaching, under the 9 Geo. 4, c. 69. The prisoners Uezzell and Parkins were not sufficiently identified, and were therefore acquitted. Eaton was found guilty. He was one of three persons who went out together armed with guns in the night to destroy game. The three were proved to have been together in one of the closes mentioned in the indictment, called the Thirteen Acres, but not for the purpose of killing game in that close, for there was none there, nor in the adjoining close by shooting from it. They were passing along it to another place. One, at least, of the three was in a close mentioned in the indictment called the Spring, which had pheasants in it, for the purpose of destroying game in that close, but the whole three were not. They were all three, however, at that time of the same company and with that common purpose. There is one count in the indictment, the fourth, stating that the prisoners were in enclosed land occupied by Charles White. The Spring and the Thirteen Acres were contiguous, separated by a fence, and both in the occupation of Charles White. There is a question, whether this will make any difference. I respite the judgment in order to take the opinion of the judges on this unsettled question. Vide Russell on Crimes; Mr. Greaves's note, 476. *The Queen v. Whittaker*, 1 Den. C. C. 310; s. c. 17 Law J. Rep. (N. S.) M. C. 127.

The case was not argued by counsel.

LORD CAMPBELL, C. J. Looking to the fourth count, we are all of opinion that the conviction is right. The confusion which exists respecting this head of law appears to me to have arisen in a great measure from not referring to the very words of the act of Parliament. It seems to have been thought that the act of Parliament contained the word "close," and that the act required that the persons should be in an enclosed field for the purpose of destroying game; but the words of the statute are, "If any persons to the number of

¹ 20 Law J. Rep. (N. S.) M. C. 192. 15 Jur. 434.

three or more together shall by night unlawfully enter or be in any *land*, whether open or enclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, crossbow, firearms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor." The practice which has been introduced of naming a particular close in the indictment is wholly unnecessary. If the indictment stated that the men were in a certain piece of land which it sufficiently describes, as, for instance, that it was in a piece of land in the occupation of any person named, it is enough. If the men are there together, forming one party for the purpose of destroying game, in any part of the land, though the land comprises Whiteacre, Blackacre, Greenacre, and other fields, and though one of the men be in Whiteacre, another in Blackacre, and a third in Greenacre, they commit an offence against the act of Parliament.

PARKE, B. If persons to the number of three are in one party in a piece of land for the purpose of destroying game there, they are within the act of Parliament, though portions of the land be described in the indictment as being in the occupation of different persons. The words "open or enclosed" lands were inserted to prevent parties from supposing that they might destroy game on waste land with impunity. The note on the statute in p. 476 of Mr. Græaves's edition of Russell on Crimes, vol. 1., proceeds upon a wrong assumption. At one time my view of the case was somewhat different from what it is at present. I think that the prisoner was properly convicted, as the men were all within enclosed land in the occupation of Charles White, as described in the fourth count of the indictment.

ALDERSON, B. It is necessary that the indictment should describe the land for the entering of which the parties are charged, but the land may be alleged to be two closes, even though they be held by different occupiers, and though one close be open and the other enclosed.

The rest of the court concurred.

Conviction affirmed.

Regina v. Hallett.

[Coram LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J., PLATT, B., and TALFOURD, J.]

REGINA v. HALLETT.¹

April 26, 1851.

Perjury — Arbitrator — County Courts Act — Power to administer Oath.

An arbitrator, appointed by an order of a county court, under the 77th section of the stat. 9 & 10 Vict. c. 95, has no authority to administer an oath, and consequently false swearing by a party sworn before him in the course of a reference is not perjury.

THE following case was stated by Talfourd, J. : —

The prisoner was indicted, at the last Spring assizes for Gloucester, 1851, for perjury, committed before an arbitrator on an arbitration directed by order of the judge of a county court, and with assent of the parties, pursuant to the 77th section of the stat. 9 & 10 Vict. c. 95. The oath was administered in the usual form by the arbitrator appointed. It was objected, for the prisoner, that the arbitrator had no power, either under the County Courts Act or otherwise, to administer the oath, and that neither by that act nor otherwise was a party sworn and giving evidence at such arbitration made liable to the pains of perjury. The prisoner was found guilty. I respite the judgment, and reserved the point for the opinion of the Court of Criminal Appeal.

The question for the opinion of the court is, whether an indictment for perjury will lie in respect of an oath so taken and evidence so given.

[It was taken by consent on the hearing, that the prisoner was one of the parties in the cause referred.]

Skinner, for the prisoner. An arbitrator has in no case an authority to administer an oath, except by virtue of the special provisions of some act of Parliament. *Watson on Awards*, p. 125, 3d ed. The stat. 3 & 4 Will. 4, c. 42, s. 41, which gives such a power, is confined to references where the submission is by order of a judge of the superior courts, by order of *nisi prius*, or by a rule of one of the superior courts, or by an agreement which may be made a rule of such superior court. The arbitrator, therefore, acting under the order of the county court, made pursuant to sect. 77 of that act, has no such power, for there is no provision in that act conferring such authority on him. Indeed, sect. 83 seems to infer that in a reference under that act the oath ought to have been administered by the proper officer of the court. Sect. 84, which imposes the penalty of perjury, applies only to cases where the person has been duly sworn before such officer, and is examined before the judge of the county court. Besides,

¹ 20 Law J. Rep. (N. S.) M. C. 197. 15 Jur. 433.

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the prisoner was a party in the cause, and not a witness merely. The section does not in terms apply to parties in the cause.

Macmahon, for the prosecution. A party to the cause is equally liable as a witness to be punished for false swearing. The arbitrator had power to administer an oath. Such a power is necessarily implied; for sect. 77 of the County Courts Act, which gives him authority to decide on the matters referred, impliedly confers the power of administering an oath, especially as the award is to be entered up as the judgment in the cause. In order to decide, the arbitrator must hear evidence; and, according to the law of England, evidence in judicial proceedings ought to be given on oath. Bro. Abr. tit. "Examination," pl. 32, says, "Chescun examination est sur un serment." See Burn's Justice, tit. "Oath," v. 5, p. 249, ed. 1845, and Lambard, p. 213. It cannot successfully be maintained that it is necessary that the power to administer an oath should be expressly given, for if such were the rule, the courts of *nisi prius* would have no power to administer an oath. When a statute gives a party a power to hear, try, and determine, it impliedly, it is apprehended, gives the power to administer an oath.

LORD CAMPBELL, C. J. It was very fitting that this point should have been brought before us, though I have no doubt at all upon it. The question turns entirely on the effect of the 77th section of the County Courts Act, 9 & 10 Vict. c. 95; for it must be conceded that there is nothing in the stat. 1 & 2 Will. 4, c. 42, or in any other statute, that gives to an arbitrator nominated under this act the power of administering an oath. This section empowers the county court judge to refer matters to arbitration with the consent of the parties; that is, it merely allows of an arbitration under authority of the court. It does not, in my opinion, give the arbitrator any power to administer an oath. And in this position arbitrators stood universally before the statute of Will. 4 was passed. They had authority to examine the witnesses and determine the matters referred, but they had no power to administer an oath. Whenever power has been given to any person to decide on matters contrary to the course of common law, and it has been intended that evidence should be given upon oath taken before the party, the power of administering an oath has been expressly given by the statute, accompanied by a declaration that false swearing shall be perjury. There is no such provision here. I think, therefore, that the arbitrator appointed by the order of the county court has no more power of administering oaths than an arbitrator acting under a rule of one of the superior courts had before the statute of Will. 4, c. 42. The false swearing, therefore, before the arbitrator, in this case, was not perjury. I may mention that my brother Parke has referred me to the report of the case of *Groenwell v. Burwell*, 1 Ld. Raym. 454; s. c. 12 Mod. 393, where the report is as follows: "And by Holt, C. J., where judicial power is given to persons by statute, they may by consequence of law administer an oath, but as to that he said he would not give a positive opinion."

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With all deference to the opinion of that learned judge, I confess that I should not entertain a doubt that where judicial power is given by statute to proceed according to the course of common law, the party so empowered may lawfully administer an oath. The distinction here is, that the proceedings before the arbitrator are not according to the course of common law. The conviction, therefore, must be quashed.

COLERIDGE, J. Our judgment does not at all proceed upon any distinction between administering an oath to a party in the cause, and administering an oath to a witness.

The rest of the court concurred.

*Conviction quashed.*¹

[Coram LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J., PLATT, B., and TALFOURD, J.]

REGINA v. ODDY.²

May 3, 1851.

Receiving stolen Goods — Evidence — Proof of Receipt of stolen Goods from other Sources.

On an indictment for feloniously receiving goods knowing them to have been stolen, it is not competent for the prosecutor, in proof of guilty knowledge of the prisoner, to give in evidence that the prisoner, at a time previous to the receipt of the prosecutor's goods, had in his possession other goods of the same sort as those mentioned in the indictment, but belonging to a different owner, and that those goods had been stolen from such owner.

THE following case was sent from the Court of Quarter Sessions of the borough of Leeds:—

The prisoner was indicted, on the 3d of April, 1851, for felony. The first count charged the prisoner with breaking and entering a warehouse and stealing therein, on the 3d of March, 1851, fifty yards of woollen cloth, the property of Isaac Boocock. The second count charged a simple larceny of the same property on the same day and year. The third count charged that the prisoner on the same day

¹ It is well settled that perjury can be committed only before some officer legally authorized to administer an oath; *Verelet's Case*, 3 Campbell, 432; *Hank's Case*, 3 Carrington and Payne, 419, (1828,) and who has also jurisdiction in the particular case in which such oath is administered; *State v. Furlong*, 26 Maine, 69, (1846;) *Commonwealth v. White*, 8 Pickering, 453, (1829;) *Montgomery v. The State*, 10 Ohio, 220, (1840;) but as arbitrators and referees

appointed under a rule of court have very generally, in this country, authority, by express statute, to administer oaths in cases heard before them, false swearing in such cases may be perjury, as in other judicial proceedings. And the fact that the trial was before such referees, instead of a court of common law jurisdiction, will not be material. *State v. Keene*, 26 Maine, 33. (1846.)

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and year feloniously received the same property, knowing it to have been stolen.

The prisoner pleaded not guilty.

At the trial, it was proved that the cloth mentioned in the indictment had been stolen, on the night between the 2d and 3d of March, 1851, from a mill, and was the property of the person named in the indictment. It was further proved that the prisoner was found in possession of it on the 10th of March, 1851, under circumstances which, it was suggested, showed an attempt to conceal the possession. It was further proved that the prisoner, upon the cloth being discovered in his possession, declared that he had obtained the cloth from a woman who was called as a witness at the trial on the part of the prosecution, and who swore it had not been obtained from her. The counsel for the prosecution proposed further to prove that the prisoner's house had been searched within an hour after the property named in the indictment was found in his possession, and that upon this search two other pieces of cloth were found in the house; and also that on the 13th of December, 1850, the prisoner had been in possession of two more pieces of cloth, and that these four pieces of cloth had been stolen on the night between the 4th and 5th of December, 1850, from another mill, and were the property of different owners, no one of whom was connected with the owner of the cloth mentioned in the indictment.

The counsel for the defendant objected to the reception of this evidence; first, on the ground that it was not receivable in support of either of the first two counts, and could therefore not be given unless these counts were abandoned; secondly, on the ground that, considering the evidence with reference only to the third count, it was not receivable, inasmuch as it did not appear, and was not suggested, that any of the four pieces of cloth were delivered to the defendant, or stolen by the person who delivered to the defendant or stole the cloth mentioned in the indictment, and that it did appear that two of the four pieces had not been received by the defendant at the same time or stolen at the same time or from the same person as the cloth mentioned in the indictment, and that it did not appear when the other two pieces were received by the defendant; but it did appear that they were not stolen at the same time or from the same person with the cloth mentioned in the indictment.

The recorder received the disputed evidence without requiring an abandonment of either of the first two counts; and on summing up, told the jury not to apply it to either of the first two counts, but he told them that it was evidence of guilty knowledge under the third count, without desiring them not to take it into consideration, unless they believed that the four ends of cloth, or some or one of them, were or was delivered to the prisoner by the person who delivered to the prisoner or stole the cloth mentioned in the indictment, or that any of the four pieces of cloth was delivered to the prisoner at the same time or stolen from the same person with the cloth mentioned in the indictment. The jury found the prisoner not guilty on the first and second counts, but guilty on the third count. The prisoner was

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sentenced to be transported for seven years, but execution of the judgment was respited and the prisoner committed to prison until the questions hereafter mentioned should have been considered and decided.

The questions for the opinion of the justices of either bench, and the barons of the Exchequer, are, first, whether, under the circumstances above mentioned, the disputed evidence was receivable. Secondly, whether the direction to the jury was correct.

Pickering, for the prosecution. The evidence, it is submitted, was properly received. It is competent on the part of the prosecution of a receiver of stolen goods to give evidence, with a view to prove the guilty knowledge of the prisoner, that other property than that mentioned in the indictment had been stolen from different owners by other persons than the prisoner, and had been received by the prisoner at other times previous to that of the transaction in question. *The King v. Dunn*, 1 Ry. & M. 146. *The King v. Davis*, 6 Car. & P. 177.

[*Lord Campbell*, C. J. In the French courts the case against an accused person is often commenced by evidence that he had previously committed offences of the same sort as that which forms the subject of inquiry. But that is not the practice of our law.]

The Queen v. Mansfield, Car. & M. 140, shows clearly that evidence may be given of what property was found on searching the prisoner's house.

[*Lord Campbell*, C. J. No doubt the witness may state what he found in the prisoner's house.]

It is submitted that the evidence may go further, and show to whom the property so found belongs, and how the owner was deprived of it. This case is in principle analogous to the case of uttering forged instruments. It has long been decided that in such a case, in order to prove the guilty knowledge, proof may be given that the prisoner had previously uttered other forged notes to other persons. *The King v. Whiley*, 2 Leach, C. C. 983. *The King v. Ball*, Russ. & R. 132. *The King v. Balls*, 1 Moo. C. C. 470. *Hodgson's Case*, 1 Lewin, 103. *Kirkwood's Case*, Ibid. *The King v. Hough*, Russ. & R. 120. In *Gibson v. Hunter*, 2 H. Black. 288, in order to show that the acceptor of a bill of exchange knew that the payee was a fictitious person, evidence was allowed to be given that the acceptor had accepted bills drawn by the same party, and payable to other fictitious payees, although it was not shown that the acceptor knew that the payees mentioned in them were fictitious.

No counsel appeared for the prisoner.

LORD CAMPBELL, C. J. I am of opinion that the evidence objected to was as admissible under the first two counts as it was under the third, for it was evidence which went to show that the prisoner was a very bad man, and a likely person to commit such offences as those charged in the indictment. But the law of England does not allow one crime to be proved in order to raise a probability that another

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crime has been committed by the perpetrator of the first. The evidence which was received in the case does not tend to show that the prisoner knew that these particular goods were stolen at the time that he received them. The rule which has prevailed in the case of indictments for uttering forged bank notes, of allowing evidence to be given of the uttering of other forged notes to different persons, has gone to great lengths, and I should be unwilling to see that rule applied generally in the administration of the criminal law. We are all of opinion that the evidence admitted in this case with regard to the *scienter* was improperly admitted, as it afforded no ground for any legitimate inference in respect of it. The conviction, therefore, must be quashed.

Conviction quashed.

[*CORON* LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J., PLATT, B., and TALFOURD, J.]

REGINA v. POTTER.¹

April 26, 1851.

Larceny — Stealing from a Counting-house — What a Counting-house.

The prisoner was indicted for stealing money from a counting-house. The proof was that he stole money from a building called "the machine-house," on the premises of a person who had large chemical works. All goods sent out were weighed in this building, and in it the men's time was taken and wages paid. The books in which the men's time was entered were brought to the building for the purpose of making the entries, but were kept in another building on the premises called "the office," where the general books and accounts of the concern were kept:—

Held, that there was evidence that the building was a counting-house within the act 7 & 8 Geo. 4, c. 29, s. 15.

THE following case was stated, by Cresswell, J., at the Spring assizes, 1851, for Liverpool: The prisoner was indicted for breaking and entering the counting-house of David Gamble, at the parish of Prescott, and stealing therein five hundred pennies, &c., the moneys of the said David Gamble.

It appeared in evidence on the trial before me, at Liverpool, that D. Gamble was the proprietor of extensive chemical works at Prescott, and that the prisoner broke and entered a building, part of the premises of D. Gamble, which was commonly called "the machine-house," and stole therein a large quantity of copper money. In this building there was a weighing machine, at which all goods sent out were weighed, and one of Gamble's servants kept in that building a book, in which he entered all goods weighed and sent out. The account of the time of the men employed in different departments was taken in that building and their wages were paid there. The books in which their time was entered were brought to that building for the purpose

¹ 20 LAW J. REP. (N. S.) M. C. 170.

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of making the entries and paying the wages. At other times they were kept in another building called "the office," where the general books and accounts of the concern were kept.

It was objected, for the prisoner, that the building broken and entered by him was not properly described as a counting-house. The jury found the prisoner guilty; and I abstain from passing sentence, wishing to have the opinion of this court on the question whether the prisoner can be punished for breaking and entering a counting-house, and stealing therein, or for simple larceny only. In the mean time, he remains in custody.

No counsel appeared on either side.

LORD CAMPBELL, C. J. I am of opinion that the conviction is right. The only question of law that can be submitted to us in this case is, whether there was evidence that the building was a counting-house. I think that there was abundant evidence of that fact, so as to bring the case within the provisions of the stat. 7 & 8 Geo. 4, c. 29, s. 18, respecting breaking and entering a counting-house.

The rest of the court concurred.

Conviction affirmed.

[*Coram* LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J., PLATT, B., and TALFOURD, J.]

REGINA v. FORD & others.¹

April 26, 1851.

Evidence — Cross examining Witness for Prosecution — Putting Deposition into his Hand.

On the trial of an indictment the counsel for the prisoner is not at liberty, when cross examining a witness for the prosecution, to put into the witness's hand his deposition, taken before the magistrate, and then ask the witness whether, having looked at the paper, he still adhered to the statement already made in his evidence in court, the counsel not intending to put the deposition in evidence.

THE prisoners were tried, at the Staffordshire Spring assizes, for 1851, before C. S. Greaves, Esq., Q. C., who stated the following case:—

The prisoners were indicted for a burglary in the dwelling-house of Edward Johnson, and stealing therefrom two hams. It was clearly proved that the burglary had been committed by some person or persons, and that a large and small ham had been stolen. The next morning but one after the burglary, Higginson and Maddock, being found in possession of the large ham so stolen, were apprehended. Maddock, whilst in custody, made a statement to a policeman, in consequence of which the policeman went with Maddock to Ford, and

¹ 20 LAW J. REP. (N. S.) M. C. 171. 15 JUR. 406.

asked Ford "where the hams were that he had bought of Higginson." Ford at that time denied having any hams; but on the way towards his house he said to the policeman, "I have the *little* ham at home, but I know nothing at all about the *big* ham." The policeman added, that neither he nor Maddock had said any thing about little or big hams in Ford's hearing before Ford made this statement. On cross examination, the policeman was several times asked whether Maddock did not say in Ford's hearing, when he first met with Ford, "that is the man that bought the big and the little ham;" which he as often denied. The prisoner's counsel then proposed to put his deposition into his hand, to desire him to read it, and having done so, to ask him, "whether he adhered to the statement, that nothing had been said about the big or little ham in Ford's hearing before Ford made the statement about them." But the prisoner's counsel did not propose to put the deposition in evidence. The deposition was signed by the policeman, and contained a statement, that when the policeman met Ford, Maddock said, "That is the man that bought the big and little ham."

I consulted Patteson, J., and finding that he had an impression that the course proposed had been permitted by some of the learned judges, but that his opinion was opposed to it, and entertaining myself a very decided opinion against such a course, and having on a previous day in the same assizes refused to permit it to be adopted, I thought it better to refuse to permit it in the present instance, but out of respect for the opinion of any learned judge who might have permitted such a course, and in order that a point so likely to recur at the sessions as well as at the assizes might be finally settled, to reserve this case for the opinion of her majesty's judges. And I respectfully request their opinion, whether the prisoner's counsel was entitled, as a matter of right, to put the deposition into the witness's hand, to desire him to read it, and then to ask him whether he adhered to the statement he had made.

William Ford was convicted, and sentenced to twelve calendar months' imprisonment, with hard labor.

The case was not argued by counsel.

LORD CAMPBELL, C. J. I am requested by my brother Parke to say, that the point raised in this case is a *res judicata*. I will read his note of it. It was as follows:—

"Some cases occurred before my brother Coltman at York, and myself at Liverpool, in which the counsel for the prisoner, in cross examining a witness for the prosecution, offered to put into his hand his deposition before the magistrate, and then proposed to ask him whether, having looked at the paper, the witness still persisted in the statement already made in his evidence in court. We had some doubt as to the propriety of this course, but it having been permitted by some judges, we thought it right to allow it. As it is very desirable that uniformity should prevail in the practice in this respect, I have to request the opinion of the judges whether we were right.

"Dated 28th of April, 1843.

"J. PARKE."

Regina v. Clements.

ANSWER.

"The judges are of opinion that the course pursued in this case is inexpedient, and ought not to be allowed for the future.

"29th of April, 1843.

"Denman, C. J.

Williams, J.

"Tindal, C. J.

Coltman, J.

"Parke, B.

Erskine, J.

"Alderson, B.

Rolfe, B.

"Patteson, J.

Cresswell, J."

After this decision, I think I hardly ought to allow the question to be reargued. Since I have been a judge, I have not had the courage to prohibit counsel from following such a course, though I have always felt it to be improper, and I entirely concur in the decision arrived at by the learned judges that it is very inexpedient, and shall act in accordance with it for the future. The true course is pointed out by all the judges in *The Queen's Case*, 2 B. & B. 288. The deposition must either be read to the witness at the time of the cross examination, and the witness then cross examined upon it, or the counsel for the prisoner must put it in as part of his own case at the proper time.

ALDERSON, B. Suppose a witness, on cross examination in court, had stated exactly what was in the deposition, and he was pressed as to whether he adhered to what he had said, and the deposition was put into his hand and the same question repeated, the jury would naturally believe that the deposition contained a different statement from that given in evidence. The course, therefore, which has been adopted in this case would enable a party to play a trick upon a jury.

The rest of the court concurred.

Conviction affirmed.

[Before LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J., PLATT, B., and TALFOURD, J.]

REGINA v. CLEMENTS.¹

May 3, 1851.

Practice — Depositions of Witness so ill as to be unable to travel — 11 & 12 Vict. c. 42, s. 17 — Grand Jury.

Depositions of a witness so ill as to be unable to travel are, under the 11 & 12 Vict. c. 42, s. 17, admissible in evidence before the grand jury as well as before the petty jury.

Semble, that an objection cannot be taken on the trial to the evidence on which the grand jury find a bill, as the bill is found on the oath of the grand jury.

¹ 20 Law J. Rep. (N. S.) M. C. 193. 15 Jur. 407.

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At the General Quarter Sessions for the county of Kent, at Maidstone, on the 31st of December, 1850, a bill of indictment was preferred against John Clements and John Smith for larceny. Upon the bill being sent before the grand jury, and the prosecutrix not appearing, they sent for the attorney for the prosecution, and intimated to him that they could not proceed with the bill without having the depositions of the prosecutrix; whereupon the counsel for the prosecution applied to the court that those depositions might be sent up to the grand jury, stating to the court that the prosecutrix was an aged woman, and too ill from infirmity to travel to the sessions; that the depositions had been taken by the magistrate at the dwelling-house of the prosecutrix, in the presence of the prisoners, who had an opportunity of cross examining the prosecutrix, and that the depositions were signed by the prosecutrix and the magistrate; and that the witnesses to prove these facts and the illness of the prosecutrix were in attendance, and that their names were on the back of the bill of indictment; which facts were afterwards proved on the trial, and the depositions of the prosecutrix read in evidence, in pursuance of the stat. 11 & 12 Vict. c. 42, s. 17. The counsel for the prisoners objected to the depositions being sent before the grand jury, on the ground that, in the absence of the prosecutrix, her depositions were not admissible as evidence before the grand jury either at common law or by the stat. 11 & 12 Vict. c. 42, s. 17, which makes it lawful to read such depositions in evidence "upon the trial;" and it was contended that the word "trial" meant trial before the petty jury, and not the preliminary proceedings before the grand jury. The court overruled the objection, and ordered the depositions to be sent to the grand jury, who thereupon returned a true bill; to which the prisoners pleaded not guilty, and upon which they were tried, convicted, and sentenced to nine calendar months' imprisonment. The court, on the application of the counsel for the prisoners, reserved the question for the consideration of this court, whether, under the circumstances above stated, it was competent to the Court of Quarter Sessions to send the depositions of the prosecutrix before the grand jury, to be read to them as her evidence in her absence.

The case was not argued by counsel.

LORD CAMPBELL, C. J. In this case our opinion is asked, whether, under the stat. 11 & 12 Vict. c. 42, s. 17, the deposition of a witness, who is so ill as to be unable to travel, is admissible in evidence before a grand jury. We have some doubt whether, sitting under the authority under which we do here, we have power to entertain such a question; but since our opinion has been asked, our opinion is, that the statute applies as well to the examination before a grand jury as the trial before the petty jury. The statute says, "And if upon the *trial* of the person so accused it shall be proved by the oath or affirmation of any credible witness, that any person, whose deposition shall have been taken as aforesaid, is dead, or so ill as not to be able to travel; and if also it be proved such deposition was taken in the presence of the person so accused, and that he or his counsel

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or attorney had a full opportunity of cross examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, *it shall be lawful to read such deposition as evidence in such prosecution*, without further proof thereof." From every consideration of the case, therefore, we think that the depositions of a witness, so ill as to be unable to travel, are admissible in evidence as well before the grand jury as the petty jury.

ALDERSON, B. I think it very doubtful whether you can take objection to the evidence on which the grand jury find a bill, inasmuch as the bill is found on the oath of the grand jury.

COLERIDGE, J., PLATT, B., and TALFOURD, J., concurred.

Conviction affirmed.

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF ADMIRALTY;

DURING THE YEAR 1851.

THE SAMUEL.¹

January 9 and 10, and April 17, 1851.

Salvage — Agreement — Two Sets of Salvors — Right of Master or Owner to accept or refuse Assistance — Delay in instituting Proceedings.

Two agreements were made with one set of salvors, which, after being acted upon for a certain time, were each abandoned by force of circumstances.

A second set of salvors saved part of the property, but at a time when the agents of the owners had given notice that no assistance was to be given by any person not belonging to the first set of salvors.

The service was rendered in December, 1849 — the action entered in May, 1850: —

Held, that the first set of salvors were entitled to a reward, not under the agreements, but as having contributed to the saving of the property.

That the agents had a right to refuse the assistance of all persons; but as only two of the second set of salvors were proved to have received the notice of the agents to that effect, they, with the exception of those two, were entitled to a reward.

But looking at the delay in instituting the proceedings, and the mode of conducting the suit on behalf of the second set of salvors, only 100*l.* allowed them *nomine expensarum*.

THIS was a complicated case of salvage; but the circumstances upon which the court founded its decree were so fully stated, and now reported, in the judgment itself, that it is unnecessary to attempt to give any outline of the case, which was argued on behalf of the several parties by

Sir J. Dodson, Q. A., Haggard, Jenner, Harding, Bayford, and R. Phillimore.

DR. LUSHINGTON. In order to obtain a clear view of the questions arising in this case, it will be necessary to state some of the admitted facts, with reference to the claims for salvage preferred by two sets of

¹ 15 Jur. 407.

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persons on account of different services. The Samuel was a brig of about three hundred and thirty-three tons burden, and whilst on a voyage from Cronstadt to London, laden with seven hundred and fifty casks of tallow and some lathwood, she, on the 28th of November, took the ground on the Hasborough Sand. She beat there for several hours, and made six feet of water; in consequence thereof the master ran her on Horsey Beach, about eight o'clock that same morning. The first persons who offered to render any assistance were some men belonging to Horsey, and they allege that they saw this vessel aground on the outer beach, and that they sent for the ship apparatus from Palling, judging, from the heavy sea, that they could not communicate with the ship without such assistance. The coast guard came, but were unable to gain a communication, on which the Horsey men launched their boat with eight hands, and, as they say, at great risk reached the ship, and took the master and seven hands out of her, the rest of the crew having quitted before; they then secured the brig to the shore; and those facts are not denied. In the course of the day, Mr. Butcher, a well-known ship agent at Yarmouth, arrived, for the purpose of acting as agent for the ship and cargo. He entered into an agreement with these persons, and to that agreement I must now refer. "28th of November, 1849. It is this day mutually agreed between Mr. Matthew Butcher, agent to the owners and underwriters of the brig Samuel, of Sunderland, and John Johnson, William Johnson, and Benjamin Bishop, for themselves and their company, that they will immediately proceed on board the said brig Samuel, now lying on Horsey Beach, stow her sails, and prepare for getting six or eight pumps put down the hold, lay out anchors that may be required, and find sufficient men to pump her off the beach, and, if requested, to get out twenty or thirty casks of tallow, and to use their utmost exertions to get the said vessel off the beach and into Yarmouth Harbor, the said Matthew Butcher finding steamtug; and, for the said services above named, the said Johnson & Co. to receive the sum of 250*l.* on the vessel being safely moored in Yarmouth Harbor. Should they not succeed in getting her into Yarmouth Harbor, this agreement to stand void; and they further undertake to bear the said Matthew Butcher harmless against any claim that may be made by any other class of boatmen on the coast."

There is some discrepancy in the statement of the salvors and owners as how this agreement was put an end to, the owners alleging that the salvors abandoned it because not sufficiently remunerative, the salvors stating that they gave it up because it was impossible to carry it into execution. It appears to me to be quite superfluous to attempt to solve this question, for the engagement was given up by mutual consent, and the reasons for so doing can have no bearing on the decision in this case, more especially as a new agreement was entered into afterwards. It is not denied, however, that these salvors acted under this agreement for some time, certainly during the 28th of November. They discharged one hundred and twenty casks of tallow, they worked the pumps, they laid out a chain cable, and they

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used every endeavor to get the ship afloat. This they were unable to effect.

On the 29th, Mr. Soutter, an agent sent from London by the underwriters, arrived. The Horsey men were in the course of the morning joined by some men from Winterton, and a fresh agreement was then entered into, to the following effect: "The under-mentioned boatmen, for themselves and all others connected with them, hereby agree with Samuel Soutter and Matthew Butcher to discharge the cargo, or as much as may be required, and convey the said cargo to Yarmouth in boats without loss of time, to deliver same into warehouse or on the quay, as the case may be — the said cargo now on board the Samuel, lying on shore — and for the services are to be paid 12s. per cask; such casks as may be landed upon the beach the boatmen are to receive the difference, after deducting the land conveyance expenses to Yarmouth; and further agree to lose no opportunity of discharging the cargo and getting the ship off and into Yarmouth, and should they succeed in getting the Samuel into that port, do leave the payment for such services to Samuel Soutter and Matthew Butcher. They are to find two crabs for crabbing the vessel to the beach, charging 5*l.* 5*s.* each for the use of the same. This agreement made at Horsey, near to where the Samuel, Captain James Masson, is on shore, November 30th, 1849." Under this agreement the salvors set to work; they lightened the vessel of more tallow, which they sent to Yarmouth, and for the freight of which they have been paid the sum of 84*l.* At seven, P. M., on the 1st of December, the vessel was got off, making much water, but they kept her afloat, dropping down with the flood tide, till the steamtug the Emperor came and took her in tow. She then proceeded into Yarmouth Roads, having on board six of her crew and thirty-nine of the salvors working at the pumps. There was not sufficient water to enable the vessel to get into the harbor that night, and accordingly she was brought to anchor. The next morning (the 2d of December) the pilot again came out, and expressed his opinion that there was not sufficient water to admit the brig; the master, however, and Mr. Soutter, determined to make the attempt. It was unsuccessful; the ship was unable to cross the bar, but struck on the south side thereof, outside the pier. Various attempts were made by the steamtug, by the salvors and others, to render assistance; their efforts, however, were ineffectual, and the vessel drove over towards the north pier, and there remained. At this time — but the particular hour is not stated — it was deemed necessary for all hands to quit her, and it is alleged by the salvors that they left a part of their men on the shore to watch her. In the course of the evening, between seven and eight o'clock, or thereabouts, she began to break up, and some part of the cargo floated out of her. The Horsey men say that they all assembled, forty-six in number, and were willing to have salved the cargo, and were capable of so doing, but that they were prevented by the second set of persons claiming salvage in this case. As to the fact that the cargo was salved by the second set, there is no dispute.

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Now, assuming for the present that the cargo was rightly salvaged by the Yarmouth men—the second set—the first question is, whether the Horsey and Winterton men are entitled to salvage, and if yea, how ought the court to estimate the value of the property? There is, however, a preliminary consideration. Were the Horsey and Winterton men acting under the agreement of the 30th of November, or were they not? Was the agreement at an end, and how? These are questions, so far as I recollect, not touched upon by the argument before me, but I must decide them. This second agreement is set forth by the owners in the terms which I have read, but I do not find that they assert it to be a subsisting agreement, or that they abandon it. The prayer is simply that justice may be done, leaving it to the court to find its way as best it may. No doubt it was a valid and subsisting agreement at one time, and acted upon. Freight has been paid under it upon certain parts of the tallow which were salvaged at an early period of this transaction. If the vessel had been got into the port of Yarmouth, the amount of salvage was to be decided by Messrs. Butcher and Soutter, but the vessel has not been got into the port of Yarmouth. The salvors say that is the fault of the agents of the owners, for attempting to take the ship into harbor at an improper time; therefore they say they claim salvage as if she had been actually brought into port. If this argument of the salvors be well founded—if they rely upon the agreement—they must go to Messrs. Butcher and Soutter to assess the salvage, and not to this court. They cannot say that the agreement is good and binding upon the owners, and not upon them. Had the owners insisted upon this agreement, I should have had no choice but to have remitted the parties to their own tribunal; but, in truth, all these questions have escaped both parties, or been evaded by them. The salvors rely upon the agreement in part, and pray the court to make a decree without reference to it. The owners allege the agreement, and neither pray that it may be enforced or considered vacated. I think that whatever judgment the court may pronounce must necessarily be founded upon somewhat vague premises, for the proper issues do not appear to me to have been distinctly raised. I think this second agreement was vacated by what occurred on the 2d of December, and by the subsequent acts of the agents. I think that the agents of the owners or underwriters were perfectly justified in acting upon their own judgment in attempting to take this ship over the bar, for they had to compare risk against risk, and it was their duty and province to decide. On the other hand, I think that the first salvors ought not to be prejudiced by this act of the agents, especially if done against their will; and I am confirmed in this opinion, because it is not alleged on behalf of the owners that the agreement is now binding on the salvors. It appears to me that the conduct of the agents was a fact unprovided for by the agreement, and that for this reason, and on account of the conduct of all parties, I must consider the second agreement as vacated by the acts of the agents on the 2d of December. I am well aware, looking at the pleadings in this case, that this is somewhat a rough kind of justice,

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but this arises partly from the nature of salvage service and the hasty agreements made on such occasions, in which it is impossible for the parties to see what circumstances may arise, and partly from the conduct both of salvors and owners in this suit. I am of opinion, therefore, that the first set of salvors are entitled to salvage — not for having salvaged this ship and cargo, for that they did not do, but for having contributed towards the salvage of what was salvaged. They did not bring the ship and cargo into a place of safety — certainly not; but they rescued her from imminent peril, and brought her into a condition whereby a part of the property was salvaged, and this by most meritorious services on their part. I take it to be clear beyond all dispute, that salvors may be entitled to reward *pro tanto* for performing a part of a salvage service, though others may complete it, as in the case of persons rendering assistance to a ship on a sand subsequently towed off by a steamer, though part of the cargo may be lost. I therefore hold that these salvors are entitled to salvage, and that it is my duty to fix the amount.

The value upon which I shall proceed is the value of the property salvaged, without any reference to the claims of the second set of salvors, and assuming for the present that the second set are successful in maintaining their claims. The amount I reserve, and no doubt that amount must depend on the question whether the Yarmouth men are entitled to salvage, or whether, under the circumstances of the case, their acts enure to the benefit of the first salvors. This brings me to the consideration of the claims of the second set of salvors — the Yarmouth and Gorleston men. With one exception their claims are all of the same character; *videlicet*, for salvage on account of tallow salvaged in various localities after the breaking up of the ship on the 2d of December. The first set of salvors entered their action in December, 1849, and that action was concluded on the 23d of May, and then, but before the proofs were brought in, the Yarmouth men began their action. In *The Clifton*, 3 Hagg. 117, where there was a delay of eight months, Sir John Nicholl observed, that such delay was contrary to the principle and object of the jurisdiction of this court, which is summary, expeditious, and of little expense; and so in *The Rapid*, 3 Hagg. 419, where the services had been rendered at Smyrna, and there was a delay of eight months, he dismissed the action on account of the delay. In this case, see what inconvenience might have occurred from this delay; the court might have heard the case for the first salvors, and made its decree upon a very different state of things from that which is now brought before it. Fortunately that did not happen, but this laches was entirely voluntary. It is always of importance to merchants and ship owners that such claims should be rapidly adjusted, and the property set free. But, independently of the effect of mere delay to the owners, this case has been heard in a manner quite unprecedented; it ought to have been conducted as one cause, with three parties, and one act on petition. Instead of that, there are two acts, and the really conflicting parties, the two sets of salvors, do not write to the same act. And what is the reason assigned for this delay and the confusion

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introduced into the proceedings of the court? Why, that the property was in the custody of the receiver of droits. That is absolutely no reason at all. The mere fact of the receiver holding possession of the property could not bar the salvors from adopting any course allowed by law for the recovery of salvage. The Wreck and Salvage Act would, indeed, become a nuisance to the ship owners and merchants of this country, if, whenever the receiver's hand be placed on property, an indefinite suspension of the settlement of salvage claims should be the consequence. I now come to consider the merits of the second set of salvors. It is not denied that by their exertions the property was saved, and of course they would be entitled to a proper reward, unless they were estopped by the intervention of some legal objection. The first set of salvors contend that they were in possession of the right of salving this cargo; that they were forcibly dispossessed by the second salvors, being, as they aver, fully competent to perform the duty. The first set of salvors say, that, these being proved, the salvage reward legally belongs to them, according to the doctrine in *The Blendon Hall*, 1 Dods. 414. The owners take nearly the same ground, adding, that the second set of salvors are *in delicto* in having forcibly undertaken this service in defiance of the orders of the master and agent of the owners. There is no difficulty at all in these questions with regard to the law, for there is no doubt that the master or agent might accept or refuse the assistance of the persons who offered to perform salvage service. Nor can it be denied, that by the Wreck and Salvage Act, 9 & 10 Vict. c. 99, s. 15, the legislature has imposed a penalty upon persons who disobey the orders of the master or owner. The difficulty, however, in this case, is as to the facts; and no labor can or will enable the court, with entire satisfaction, to form an opinion upon evidence so conflicting as occurs in this case, and with no means of testing the credit of the witnesses. The claims of the second set of salvors relate to transactions occurring in the evening of the 2d of December, after the unsuccessful attempt to get the brig into Yarmouth Harbor. These salvors state that the vessel, after having struck on the bar, drove across the harbor to the sand bank, which lies to the east of the north pier, and to seaward; that about half past eight, P. M., the brig broke up and became a wreck, and her cargo (principally tallow) washed out, and was dispersed along the coast, and between the two piers; that many of the casks were smashed, and a quantity of tallow floated loose in large pieces. Admitting this to be a true statement, the first question which occurs is, whether the first set of salvors could be said to have been in possession—corporal possession they certainly had not—were they in a *de jure* possession under the second agreement. Was that subsisting at this time, and did it extend to the then existing state of circumstances? I am not satisfied that it could be extended to a state of facts such as I have stated. Was, then, a third agreement applicable to this state of things? This question is buried in great obscurity. That the ship and cargo were not abandoned by the master, agents, or crew, is abundantly clear, though they were compelled to quit her. The statement of the

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owners and first set of salvors is, that they left her as a matter of necessity, and that they repaired to a public house for refreshment, leaving a part of the first set of salvors to watch the ship. This, no doubt, is perfectly true; but what does it prove? It proves that the master and agent hoped and intended to effect the rescue of the ship, and no doubt by the assistance of the first set of salvors, and probably too in the consideration of the second agreement, and in continuance of it. But it appears to me that neither the second agreement comprehended, nor did the master or agent contemplate, when they quitted the place near the vessel, the immediate occurrence of that which actually took place, namely, the breaking up of the vessel. If they had, it would have been their duty to have remained on the spot to give the necessary orders, and certainly not to have crossed to the other side of the harbor. I am well aware that in the rejoinder, and not before, it is stated that it had been arranged, that if the *Samuel* should break up, they were all to assemble on the beach to assist in saving the cargo, and that this averment was supported by several affidavits. I cannot consider this arrangement, such as it was, a new arrangement; nor did the owners so regard it. Upon the ship breaking up, and the tallow washing out, the master and agents were called to the spot, and no doubt intended to employ the first set of salvors in saving the cargo; but were they at the time, as a matter of right, in possession, and entitled thereby to perform the salvage service? It is clear they had not quitted the vessel with the intention of abandoning her, but in legal possession I think they were not, for the agreement was at an end. I have dwelt at length upon this part of the case, for had I come to the conclusion that the first set of salvors were in possession and illegally dispossessed, I must at once have carried into effect the undoubted rule of this court as laid down in *The Blenden Hall*. The case would have assumed a very different aspect if the first set of salvors had been employed generally to save the ship and cargo, and not under a specific agreement, which, I think, had terminated, or rather been put an end to, by the occurrence of circumstances unforeseen by all parties. But this conclusion leaves totally untouched another question, which I must decide, namely, whether, in violation of the Wreck and Salvage Act and the general maritime law, the second set of salvors, contrary to the desire of the agent and master, assumed to themselves the right of performing the salvage service, and of excluding the persons selected by the agent or master to perform it. This part of the case, then, resolves itself into a question of fact, whether the second set of salvors were prohibited by the agent or master from performing the salvage, and informed that by their orders the first set of salvors were employed. The evidence on behalf of the owners proves, that to some persons or other repeated orders were given to abstain from interfering with the salvage of the cargo, but the first difficulty which strikes the court, is this: To whom was such prohibition announced? Not to all the second set clearly, for it could not be communicated to them. With a very slight exception—two persons—it is not attempted to identify those to whom the notification was made. How

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is the court to do this? It was said in argument, that it could not be expected that the evidence should prove that two or three hundred persons each had notice. Certainly not; but surely the court had a right to expect that the identification should go further than it has done. Here is a stormy, dark, December night, the wind blowing and the sea raging, a ship broken up, the cargo floating in several directions, and hundreds of persons near the spot. Why, in such a scene of darkness, noise, and confusion as this, I freely admit that it would be very difficult to bring home to two or three hundred persons the notification of any particular fact; but without evidence the court cannot conclude that any one has been guilty of an illegal act, more especially it cannot when those claiming salvage have distinctly sworn that they had no intimation of any such prohibition. The real truth of it I apprehend to have been this: that such a notice and prohibition were given, that probably many of the second set of salvors heard it more or less distinctly, that it was impossible to identify all who heard, and that the parties were unwilling to incur the unpopularity of identifying some, and that many certainly never heard or knew of the prohibition at all. Under these circumstances, it would be injustice to disqualify a whole class, and, for want of evidence, I cannot select the guilty, except in the case of two persons. I am of opinion, therefore, that I cannot deprive the second set of salvors of all claim to salvage, and I think I do no injustice to the owners, for the service ought to be paid for, and it will certainly not be paid for twice, for, as I have already said, the first set of salvors were not illegally dispossessed, and consequently can have no claim upon that ground to the salvage earned by the second set. The next step is to consider the nature of the service which has been rendered. It appears to me that an error has existed in this case, not merely in the minds of the salvors, but of other persons mixed up in this matter. It seems to have been thought, that upon the ship breaking up and the cargo floating out of her, such cargo became derelict, that consequently all persons who could were entitled to save it, to claim a reward as if it were derelict, and that all incidents attaching upon derelict attached upon this property. I am of opinion that this notion was wholly erroneous. The ship and cargo were, in the eye of the law, in the possession of the master, though he was not and could not be actually on board. But it may well be that certain parts of the cargo afterwards became derelict, by being carried by the force of the elements out of the possible reach of the master or agent, or beyond hope of recovery; and such appears to have been the case with some portions which were carried out to sea. I will now state my intention as to the first set of salvors. Assuming their number to be about forty, and that they had received 84*l.* on account of part of the cargo, I shall, in consideration of their services, decree to them the sum of 250*l.*, treating them as having performed a part of the salvage service, and I give them their costs. With regard to the second set of salvors, it is more difficult to deal with them — perhaps I may say impossible to determine as to each with accuracy. According to Mr. Butcher's affidavit, the quantity of tallow saved from

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the ship after she broke up was two hundred and ten tons — one hundred and thirty tons at the bight at the back of the north pier, forty tons at the inner end of the north pier, twenty eight tons on the south or Gorleston side of the river, and other parts picked up by vessels on that side. All the carting has been paid for by the owners. The case of this second set of salvors is contained in eighty-two affidavits, a number which I trust never to see again in a salvage case. The only course which I can adopt is to divide the case into classes — tallow found, first, at the north pier; secondly, at the inner end of the north pier; thirdly, on the south side of the river; fourthly, out at sea, and not in the harbor. I shall give one fourth of the value upon the two first classes, one third upon the two last, adopting the valuation of Mr. Hammond. I pronounce against the claim of the two persons already referred to. The only way in which I can deal with the tenders is to pronounce for them if they agree with the rates I have mentioned; if less, then for the salvage, according to the rate I have stated. I now come, lastly, to the question of costs. I have very much deliberated upon this case, and think myself bound to take notice of the delay in instituting this suit, and the mode of conducting it, whereby the owners have been put improperly to expense and to much inconvenience. As a measure of justice to them, I shall not give the whole costs. I would, as far as it was in my power, recompense them for any loss they have sustained, if I had the power to carry it into effect. Instead of giving the second set of salvors the whole costs, I shall give the 100*l. nomine expensarum*.

Haggard applied to have the expenses of Hammond's valuation, which amounted to 70*l.*, paid out of the proceeds, and not thrown upon the second set of salvors.

DR. LUSHINGTON. I think the valuation should be paid by the owners.

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May 16, 1851.

Bottomry Bond — Duty of Lender — Bond pronounced against.

A British ship, being damaged, was repaired at Elsinore, where she arrived on the 18th of October. S. & Co. undertook the management of and ordered the repairs, and corresponded with the owner of the ship and part owners of the cargo, but gave no intimation to them or the master of their intention to take a bottomry bond as a security, for many weeks, and only just before the ship sailed: bond pronounced against, with costs, on the ground that the repairs were ordered, in the first instance, on personal credit, and that S. & Co. should have given the master and owners immediate notice of their intention to take a bond.

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THIS case came before the court on several occasions, and was discussed at great length; but the judgment of the court states so fully the nature of the case, the pleadings, and the arguments, as to render any further statement unnecessary.

Addams and *Twiss* were heard for the bondholders.

Sir J. Dodson, Q. A., and *Harding*, for the owners of the cargo.

There was no appearance for the ship, which had been sold, and the proceeds brought into the registry.

DR. LUSHINGTON. The question for the decision of the court is, whether a bottomry bond, dated the 6th of December, 1849, is valid, so far as relates to the cargo shipped on board this vessel, and the freight due. The case, in some of its circumstances, is peculiar. The bond was executed at Elsinore in favor of Messrs. Severin, Steison, & Co., of that place, for the sum of 1012*l.* 2*s.* 7*d.*, at a premium of 18*l.* per cent. It purports to bind the ship, cargo, and freight. The original voyage was from Cronstadt to Bristol, with tallow. The action was commenced on the 3d of January, 1850, against the ship, cargo, and freight. No appearance was given for the owner of the ship, but the owners of the cargo did appear, and gave bail for that and the freight. The ship has been sold, and the net proceeds, 274*l.* 13*s.* 8*d.*, brought into court. Some delay arose in the proceedings, but on the 3d of December, 1850, the cause came on for hearing. After the case had been partly heard, leave was given to the proctor for the bondholders to produce the master, who was examined on the 3d of April. In the original act, on the part of the bondholders, it is stated, that in consequence of tempestuous weather the vessel put into Elsinore in a damaged state; that repairs being necessary, and neither the master nor the owner having any personal credit, he took up the necessary moneys of Messrs. Severin, Steison, & Co., on bottomry; and that on the master's arrival at Bristol he delivered to the owners of the cargo the bills, vouchers, and other papers, which still remain in the custody of their agent, who refuses to deliver them up. The defence of the owners of the cargo is set forth in the answer, and the grounds on which they allege the bond to be invalid are, first, that Messrs. Severin, Steison, & Co. were the agents of the owner of the ship, Mr. John Beara, of Bideford, and that, as such agents, they undertook the entire management of the ship, and gave all directions; that Elsinore is only four days' post from England; that Messrs. Severin, Steison, & Co. carried on a regular correspondence with Mr. Beara, and with Gwyer & Co., the owners of part of the cargo, but never informed them that a bottomry bond would be required, or applied for funds, though they drew upon Gwyer & Co. for sound dues, and stated in one of their letters that they should so manage the averages as to avoid drawing on Mr. Beara. The first intimation of a bond, bearing date the 6th of December, was in a postscript to a letter dated the 5th of December; that no notice was given to Gwyer & Co., who would have advanced the money to save

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a bottomry bond. Then comes this very material allegation — that no application was made by the master to Messrs. Severin, Steison, & Co. to advance the necessary sums on bottomry, nor any agreement made; that the vessel was repaired by the orders, and under the directions, and upon the responsibility of that firm, without any intimation to the master of their intention to require a bond until the ship was nearly ready to sail; that the repairs were completed before any such intimation was given; and that commission was charged, as agents, at the rate of 3*l*. per cent. In the reply, general agency is denied, but Messrs. Severin, Steison, & Co. allege that they were agents for the owner of the ship for defraying the sound dues and customs' charges; that they drew on Gwyer & Co. for such duties for 14*l*.; that on the 18th of October they informed Gwyer & Co. of what had happened to the ship, and received no answer; that Messrs. Severin, Steison, & Co., — these are very important facts, — at the request of, and in conjunction with, the master, gave directions for the necessary repairs; that by letters dated the 20th of November, 1849, they informed Messrs. Gwyer & Co. of the repairs being nearly completed, and that the 14*l*. was still unpaid, and no answer being made to these letters, and the master having no credit, he agreed to give the bond. When he agreed to give the bond, the court is supplied with no information in this reply.

Now, it appears to me, having carefully examined this case, that two questions are raised: first, whether any bond ought to have been granted at all, without express previous communication with the owner of the ship and the owners of the cargo. In all cases the law certainly does not require such communication, and there may be cases in which it is indispensable; and if it be necessary to go into this question at all, the inquiry must be this, whether, in the particular circumstances of this case, the law does require any such communication. The second question is, whether the bond was invalid, because Messrs. Severin, Steison, & Co. had ordered the repairs on personal credit, without any understanding or agreement for a bottomry bond. Of course the fact must be ascertained before the question can be properly dealt with. I will at present only observe, that the reply does not very satisfactorily join issue on this point. It does not meet the direct averment contained in the answer with any thing like direct contradiction — a mode of pleading which generally produces more trouble to the court than advantage to the parties adopting it. In all these cases the evidence of the master is of the very first importance, because he must necessarily be conversant with all the facts of the case — he must know all the circumstances under which he signed the bond. When the case first came on for hearing, there was no affidavit produced from the master at all; and the court thought there was no satisfactory account given why that affidavit was not produced. The court was of opinion that the reasons assigned for the absence of that affidavit were wholly and altogether unsatisfactory; but being anxious that the case should be decided upon its real merits, and not possibly on any misapprehension or mistake, I gave the bondholders the indulgence — for such it certainly

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was — of further time, and enabled them to produce the master as a witness. He has been produced, and examined by counsel on both sides; consequently I am entitled to presume all the facts are now before me; all the facts, at least, on which the bondholders rely in support of the validity of this bond. It appears to me advisable, in the first instance, to address my attention to the second question, because it may be immaterial to discuss the first, namely, whether the repairs were done on the responsibility of Messrs. Severin, Steison, & Co., by their order, and without any contract, undertaking, or understanding that a bottomry bond should be given to them; and if such be the fact, of course I must see and inquire what is the law applicable to such a state of circumstances. With regard to the law, I apprehend the general rule to be, that if a merchant order repairs, for which he makes himself responsible, without an undertaking by the master that a bond shall hereafter be granted, he cannot protect himself by a bond. It is possible there may be exceptions, as in cases where the master is dead, where the urgency is extreme, where the merchant advances money intending to require a bottomry bond from the beginning, and gives the owners the earliest possible notice of such his intention. In such cases the bond might be upheld, though no agreement for it was originally made. These, however, are very peculiar cases, and cases of exception. The general principle is laid down in *The Augusta*, 1 Dods. 283. Now, this rule appears to me to be founded on sound reason, and on principles practically useful in commercial affairs. It is necessary the master should be apprised of the intention to take a bottomry bond, that he may have time and opportunity to exercise his discretion as to entering into the contract, or trying, at least, to take other means to avoid the necessity, time and opportunity to advise with the owners of the ship and cargo, if it be practicable; if not, at least, to consult with persons on the spot. A ship arrives in a damaged state; the master goes to a merchant; he may or may not be the agent of the owners of the ship; the master applies to him for assistance, and, considering the class of men that masters of ships generally are, probably in vague and indefinite terms; all the master knows is, that repairs are wanting, that the owner must ultimately pay for them, and that he himself has no personal credit. Surely the merchant is not at liberty to give the orders for the repairs, or advance money, and then demand a bottomry bond, without previous notice of such intention to the master or owners. Surely the merchant, the man of business, is bound to declare to the master what course he will pursue, to say whether he will advance the necessary funds on personal credit, or become responsible for the repairs on personal credit, or at once to declare, that if he does advance or become responsible, he shall require a bottomry bond. I do not say that that circumstance alone would invalidate the bond; certainly not; because cases may have occurred in which a master has been held justified in incurring such expenses for the sake of bringing the cargo to a port of destination, notwithstanding those expenses have swallowed, and infinitely more than swallowed, up the whole of the ship. But the master must have an

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opportunity of considering and deliberating what is best for the interest of all concerned. He may think, looking at the heavy expense attendant upon a bottomry bond, that it would be more advisable to tranship the cargo, and he must have an opportunity of judging of the extent to which the expense will go, the amount involved, or communicate with those interested, and await an answer.

Now, is not the present case a striking instance of the truth of what I have said? The ship has been sold for half the sums expended upon her. Look at the case in another point of view. A bond is a contract in consideration of something to be done; but if the money be advanced or responsibility incurred without a previous contract, there is no consideration for the bond. In short, with the exception of some advances, made as a matter of necessity—as for pilotage, or demands of that kind—I apprehend the rule of law to be, that the agreement for bottomry must precede the advances, or the incurring responsibility. All advances made without such agreement can only be advances on personal credit, and the case of *The Augusta* is a direct authority that no advances on personal credit can afterwards be converted into a bottomry transaction. That case has now stood the test for nearly forty years. It stands not simply on the high authority of Lord Stowell, who decided it, but I believe it has been universally acquiesced in from that time to this. This, then, I apprehend to be the rule, and such the reasons on which it may be founded; but care must be taken not to apply it to cases which, though apparently in some respects similar, are still distinct. For instance, take the case of a master ordering repairs and supplies on credit given to him personally; those who gave the credit cannot take a bottomry bond, but a merchant, a stranger to such transactions, or even an agent, if he has not made himself responsible, may advance the money on bottomry to liquidate such demands; or the ship might be detained, and the voyage might be defeated. Now, the distinction is apparent in this latter case; the advance of the money is the consideration for the bond. In the former case a bond is ingrafted on a debt due, incurred on personal credit, without any consideration for such conversion. Then to apply this principle to the present case. The evidence in support of the bond consists of the affidavits of Mr. Beara, the owner of the ship, of Messrs. Severin, Steison, & Co., and the evidence of the master; and there is also some documentary evidence. With regard to the proof, it cannot be said in this case that the bottomry bondholders have been in any difficulty from the opposition offered to them on the part of the owner of the ship and of the master of the ship, for the owner of the ship has admitted the bond to be valid, and submitted to any loss which might occur to him. The ship has been sold, and the proceeds must go to satisfy the bond. Not only has he done that, but he has very properly come forward to make an affidavit in the case; and if that affidavit contains a true statement of all the facts necessary to be known for the elucidation and decision of this case, the court would approve of such conduct; for there is no reason whatsoever, because he himself is a sufferer by the execution of the bond,

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and has submitted to what he considers the justice of the case, in surrendering the property, that he should not give also full and fair testimony in the dispute which took place between the owners of the cargo and the holders of the bottomry bond. But I make these observations more especially with a view of showing that the holders of the bottomry bond have been placed in no peculiar difficulty on the present occasion, but rather, on the contrary, have had an advantage which seldom occurs in these cases, by the owner of the ship assisting them, in order to obtain justice. I must advert briefly to this point.

He states, after the vessel had met with an accident she put into Elsinore; the master applied to Messrs. Severin, Steison, & Co. for their advice and assistance with reference to the damaged state of the vessel, whereupon the cargo was discharged. Now, there is an hiatus, and I am sorry to say I do not find, which is much to be lamented, that he states in any degree what occurred subsequently, but I presume personally he was unacquainted with what did occur. He says the cargo was discharged, and a complete survey made, under the immediate inspection of Lloyd's agent, by the surveyor for Lloyd's. I have no affidavit from the surveyor of Lloyd's; I have a survey, and no doubt there was a necessity for very extensive repairs. "And the deponent further made oath, that William Pickard, the master of the said vessel, immediately the survey was made, wrote to the deponent, as the owner of the said vessel, with a copy of the survey; and Messrs. Severin, Steison, & Co. informed the deponent that they should be able to manage so as to avoid their drawing on him (the deponent) for the repairs of the said vessel." Now, in the first place, I should have expected to have had annexed to this affidavit the letters the master so wrote home; and, in the second place, I should have expected to have found the answer. The answer to the master is the most important part. What directions did Mr. Beara give to the master when he found that his ship had incurred this tempestuous weather, had met with this damage, and required these extensive repairs? Did he instruct the master that he was to take up money on bottomry, or what measures he should pursue at all? It is singular enough, all this part of the transaction is kept in the dark, and a single passage is extracted from the letter of Messrs. Severin, Steison, & Co., "that they should be able to manage so as to avoid their drawing on him (the deponent) for the repairs of the vessel." Now, I was carefully looking, during the discussion, to see what solution would be given to this statement, and I heard none that was satisfactory. I should like much to have known what was the impression made on the mind of Mr. Beara when he was informed — he having sworn distinctly he had no credit — that all this would be managed, and no draft would be drawn on him — in what way he supposed these repairs were to be paid for — the necessary expenses incurred were to be liquidated. He gives no solution of this question. The very documents I have inquired for, which might have solved the question, are not brought forward before the court. I must presume that these documents would have

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been brought before the court if advantageous to the case of the bottomry bondholders, because I plainly perceive, from the whole tenor of the case, that Mr. Beara has rendered every assistance in his power, and I think the master too. Then he goes on to swear, "That deponent at such time was very much surprised to find, from the said Messrs. Severin, Steison, & Co., that they could manage to get the said vessel repaired without drawing upon him." Now, that is a fact in the cause, and I am not the least surprised at it myself, for I think his astonishment must have been great, "particularly as," he says, "he had no credit in any way with the said Messrs. Severin, Steison, & Co., or any other person at Elsinore to whom the master of the said vessel could apply for assistance, and was at a loss to know how the same was to be arranged." I think it is rather to be lamented, being placed in this state of difficulty and astonishment, or, rather, being so agreeably surprised at this, that he did not avail himself of the opportunity, when it appears he was making some little inquiry how this wondrous contrivance was to be brought to bear, but he leaves the court in the dark. He then goes on at once to enter on the subject. "He made oath that the said vessel having been repaired and ready for sea, the said cargo was re-shipped, and immediately on the sailing of the said vessel, the said William Pickard, the master, wrote to him, (the deponent,) informing him that he had executed a bottomry bond"—not telling the court whether he had any information on the subject before, or whether it was the first time he ever heard of a bottomry bond—"being the bottomry bond now proceeded for in the cause." And he then goes on to say, "Messrs. Severin, Steison, & Co. never were, or acted as, the regular agents of him (the deponent) for the said ship Wave, or any other ship over which he has any control, neither has he any regular agent at Elsinore, or any credit there; and in consequence thereof, it is entirely at the option of the master of the said vessel as to whom he may employ." He says at the conclusion—it is not necessary to go through the whole—"He further made oath, that if the said William Pickard, the master of the said vessel, had applied to him (the deponent) to remit the amount of the outlay made upon the said vessel Wave, he could not at such time have paid the same, and therefore, unless Messrs. Gwyer & Co., of Bristol, the owners of the cargo, and who were aware of the accident which had befallen the said ship, as before set forth, and of the necessity of the same being repaired, had arranged for the payment of the cash necessary for such purpose, the master of the said vessel had no alternative but to raise the amount upon bottomry." This may all be true, but it is singular enough the idea should not occur to him when informed of these particulars; the necessity of a bottomry bond, if no one else advanced the money, was just as clear when he received the first letter as when he made this affidavit. That is the affidavit of Mr. Beara. There is an affidavit from Messrs. Severin, Steison, & Co., and they swear generally to the facts, and, in the words of the act on petition, that they were applied to for their advice and assistance. They go on to state that a survey was made, and so forth, and they

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say no answer was received to the letters addressed by Messrs. Severin, Steison, & Co., (I will consider the letters presently,) "who, at the request of and in conjunction with the said William Pickard, the captain of the said schooner, gave directions for the necessary repairs of the said schooner." Then, the repairs having been set forth, they state they demanded a bottomry bond. Now, I am looking at the question of the law, and I find a statement in the original affidavit, that their giving of orders for the doing of these repairs was in conjunction with the master, which is of no importance, for clearly the repairs were done on their responsibility, and that, long before any bottomry bond was even mentioned or suggested; for throughout the whole of this affidavit there is not one single word stated, that from the beginning to the end, until four or five days preceding the date of the bond, the 6th of December, they ever mentioned the word "bottomry" either to the master or to any one else; and they say, speaking of the letter, that they, Severin, Steison, & Co., wrote to the owner to say that they would be able so to manage as to avoid requiring an immediate remittance, but not saying that they thereby meant that they intended to take a bottomry bond. When we come to look at the letters, we shall see that nothing was said on that subject at all. Now, to go a step further in the case, there has been the evidence of the master, the substance of which I may state in a few words. The master was examined, and every possible attempt was made to induce the master to give evidence to the effect that there was some understanding, if not an agreement, that a bottomry bond should be granted; but the master would not so swear. On the contrary, he stated it was not till after the arrival of the second letter towards the end of November, when the repairs were all but completed, that any mention was made to him of a bottomry bond at all; therefore the evidence of the master does not in the slightest degree support that which was the material averment; the fact, that there was either an agreement or an understanding for the advance of this money. So much, then, for the evidence of the witnesses; and now I will just look at the correspondence. Annexed to this affidavit of Messrs. Severin, Steison, & Co., is a letter, dated the 15th of October. That is a letter stating that they request to be paid the sound dues; and I may observe upon this, there was very much argument in the course of these proceedings. It was said it was very unlikely that Messrs. Severin, Steison, & Co. would advance money, unless on bottomry, seeing that their draft for 14*l.* for sound dues on the cargo had not been paid. So the matter stood; but I thought it right, in the administration of justice, having given the other party the opportunity to produce the master — an opportunity they had forfeited for not attempting to do so at an earlier period in the cause — that I should let in an affidavit from the agent of the owners of the cargo at Elsinore; and from that affidavit it appears that Messrs. Severin, Steison, & Co. have refused to take the 14*l.* when it has been tendered to them. The following is the letter to which I more particularly allude; it is dated the 18th of October: —

The Wave.

"Gentlemen,—Referring to our last respects of the 15th instant, we beg leave to inform you by the present, that the Wave, Captain Pickard, had the misfortune, on the 17th instant, to get ashore, on account of the current, on the Castle Point, where she got so leaky that she has been obliged to put into the harbor, where she will have the cargo discharged, and be repaired, as you will observe from the enclosed copy of the survey. We hope soon to bring the Wave under way again; and remain meanwhile, gentlemen, your most obedient, humble servants,

"SEVERIN, STEISON, & Co."

Let us consider a little the effect of this letter. Certainly here is no indication, directly or indirectly, that there is the slightest intention of requiring a bottomry bond; none whatever. Indeed, the last clause, which I have just read, does to a certain extent negative the idea that a bottomry bond would be required, because it states that they hope soon to bring the ship under way again. That is the whole of the statement; but to prevent mistake, I must make this observation on the letter—if this was a question such as has previously occurred in other cases, whether this was a sufficient indication to the owners of the cargo of the state which the vessel was in, I should hold that it was; and if the agreement had been made upon this, *ab initio*, for advances upon a bottomry bond, I should have held that the owners of the cargo had sufficient knowledge, not of the intention, but of the state and condition of the vessel. But the purpose for which I am now looking at it is this—to ascertain the fact whether there was any agreement or understanding for a bottomry bond at all, because if there had been one, it was the duty of Messrs. Severin, Steison, & Co. to have communicated that intention to the owners of the cargo at the moment the letter was written: but there is no such intimation given. So much for that. Now we come to a letter of the 20th of November. "We beg leave to inform you by the present, that the Wave's repairs are now so far advanced that she will begin to take in her cargo after to-morrow, and we hope to be soon able to inform you of her departure. We shall be glad to learn that you have settled our assign on your good selves for sound dues, 14*l.*, which we have paid to the custom-house for your valuable account per said ship." The same total silence, no intimation of bottomry then on the 20th of November. Then there is one other letter annexed to these, that completes the letters so annexed to the affidavit. It is the letter marked "No. 6," addressed to John Beara, Esq., and dated the 7th of November, 1849. "Captain Pickard has just received your favor, and we beg leave to state that we shall manage the average so as to make no drafts at all on your good self." That is the whole of the letter, no other intimation whatsoever of the course they intended to pursue, no intimation of any necessity for a bond, and no information of any fact; for in what sense they used the word "average" I am not very clearly prepared to say, and it matters not at this moment. Mr. Beara was informed, as I state, that no drafts were to be drawn on him, and no such intimation was given to the

The Wave.

owners of the cargo at that time that any such letter had been written to Mr. Beara, the owner of the ship. There are one or two other letters which I will advert to. The first letter, I take it, is a mere duplicate. That is the letter dated the 18th of October, and it contains the survey. The next letter is addressed to Messrs. W. & J. Gwyer, Bristol, who were part owners of the cargo, which is somewhat in the words I have read before: "We beg leave to inform you by the present, that the Wave's repairs are now so far advanced that she will begin to take in her cargo." The next letter, dated the 5th of December, is in these words: "We beg leave to inform you that the Wave's average is finished, and the ship ready for sea, and will proceed on her voyage by first good wind and weather." Then comes a postscript: "The average amounts to 1012*l.* 2*s.* 7*d.*, where-against Captain Pickard signed a bottomry bond at 18*l.* per cent. premium." This is dated the 5th of December, 1849; the vessel met with her accident on the 17th of October, and the communication of that accident was made by Messrs. Severin, Steison, & Co., to the owners of the cargo, on the 19th of October. All this time elapses, and they were not informed of the intention to take a bond until the bond had actually been taken and signed. So much, then, with reference to that fact. There is another letter or two which, I think, I may as well read, annexed to the affidavit of Mr. Brooke Smith:—

"Elsinore, October 18, 1849.

"John Beara, Esq., Bideford.

"Dear Sir,—We beg leave to inform you that your Wave, Captain Pickard, had the misfortune, on the 17th instant, by getting under way, to come, on account of the current, ashore on the Castle Point, where she got leaky in such a manner that she had to put into this harbor, where the cargo shall have to be discharged, and the ship repaired, as you will observe it from the enclosed copy. We shall pay our best attention to this affair, and now and then inform you of particulars; meanwhile

"We remain, dear sir,

"Your most obedient, humble servants,

"SEVERIN, STEISON, & Co.

"Captain Pickard will write to you to-morrow."

So that they undertake the matter as agents, and charge as agents, and give no intimation as to the amount, or whether they shall draw upon him. Then comes another letter, of the 27th of October: "Referring to our last respects of the 18th instant, we by the present beg leave to inform you that the Wave, after having taken out her cargo, was had down to-day with starboard side up, where she will have to be caulked over all, and some yards of planks to be taken out. We shall write you again when the other side comes up; and by the next mail Captain Pickard will write to you." There is nothing more except an insignificant postscript. So that a correspondence was going on throughout the whole of this period, and that is the particular reason why I advert to it. There is nothing important in the letter; I read it to show that there was a continuous corre-

The Vargas.

spondence with the owners of the ship and cargo, and it is rather the negative I look to, namely, there is no mention of a bottomry bond throughout. Then follows the letter I have already read an extract from, dated the 17th of November, stating they do not mean to draw on Mr. Beara. I am not aware that it is necessary to enter more minutely into the evidence; I have gone through all the important letters in this case; the question is, What is the result of this evidence? Now, the result of this evidence, in my opinion, is perfectly clear; the result is, that there was no understanding, no agreement, and nothing had passed with the master with regard to a bottomry bond until the receipt of the second letter from the owner of the vessel, at the end of November, six or seven weeks after the accident occurred; that there was most ample opportunity for Messrs. Severin, Steison, & Co., of which they availed themselves, to correspond both with the owner of the ship and with the owners of the cargo; that they did so from time to time, and never upon any occasion intimated their intention to take a bottomry bond. Now, under these circumstances, if I come to the conclusion, as I do, that there was no agreement or undertaking for the bottomry bond until the repairs were finished, they having been ordered on the responsibility of the house of Messrs. Severin, Steison, & Co., I cannot escape the conclusion of law, that a bond so taken is invalid; and I have no wish in this case to escape from that conclusion of law, because, when I look at the account, the vouchers and expenses incurred, and the charges made, and I see that these gentlemen must have been apprised, if they intended to take a bottomry bond at all, of the necessity of so doing from the earliest possible period, I consider it was their bounden duty to advise the owners of the ship and cargo, with whom they were in correspondence, of such intention, and they did not do it, but kept back and concealed such intention, if they ever entertained it, till the very period of taking the bond. I pronounce for the invalidity of the bond, and certainly do so with satisfaction to my own conscience. It is not only illegal in point of law, but not justifiable as a mercantile transaction. And I so pronounce against the bond with costs.

THE VARGAS.¹

April 30, 1851.

Practice — Attendance of Trinity Masters.

Application was made to the court for the attendance of Trinity masters upon the admissibility of a plea. Application refused.

THIS was a case of damage, and the proceedings were by plea and proof. A responsive allegation was brought in on behalf of the

¹ 15 Jur. 710.

The Vargas.

owner of the *Vargas*, the ship proceeded against; the admission of which was opposed on the ground that the account of the collision therein pleaded was, as a matter of fact and of nautical experience, impossible, and therefore incapable of proof.

Sir J. Dodson, Q. A., and Jenner were heard in opposition to the admission of the allegation.

Addams and Twiss, contra.

DR. LUSHINGTON. In this case application was made for the attendance of *Trinity* masters; I thought it my duty not to comply with that application. When these cases are ready for hearing, and furnished with evidence, I am always very glad to have the assistance of those gentlemen; but I believe that, drawn as the pleadings necessarily are, it would be most inconvenient to call them in upon the question of the admissibility of a plea. At all events, the application is, as far as I know, quite unprecedented, and I think I was quite right in refusing it. As far as the allegation is concerned, I will not take it upon myself to say that the averments are incapable of proof; the party has a right to set up his own case, and if he relies upon a state of facts which turns out to be untrue, or impossible, he must take the consequences. I admit the allegation.

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1. *Specific Performance — Disabilities.*] The E. C. Railway Company had a bill before Parliament for making a railway from W. to S., with a line diverging from the main line to N. One of the objections to the bill was, that the diverging line would cross another railway line. When the bill was in committee it was ascertained that this objection would be removed, if the company were to obtain an estate which stood settled on A for life, with remainders over, which estate, however, by their bill they would not be authorized to buy. An agreement was entered into between the company and A, by which the company agreed to purchase this estate from A, and to perform all such acts as might enable A to sell the estate. The bill was passed, without obtaining any powers to purchase A's estate, and omitting the diverging line. The line from W. to S., and every thing connected with it, were afterwards abandoned by the company. In a suit by A against the company for a specific performance of the agreement:—

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1. *School — Injunction.*] A covenant not to carry on any calling in a house, or to suffer the same to be used to the annoyance of other houses, extends to keeping a girls' school. *Kemp v. Sober*, 64.

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2. *Stat. 1 & 2 Vict. c. 110.*] By the act of 1 & 2 Vict. c. 110, it was the intention of the legislature to make property of a judgment debtor, which is in such a position that the creditor cannot lay hold of it, liable to the judgment. *Ib.*

3. *Order of Court.*] Where there is in the possession of any officer of the court property which proves to be liable to a creditor, or to be held for the sole benefit of any person, it is improper to seize it without an order of the court. *Ib.*

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1. *Inconvenience.*] The S. and B. Railway Company had entered into a contract with the S. and C. Railway Company as to the working of their line. The S. and B. Railway Company now alleged that the contract was void, and proposed to enter into an agreement with the L. and N. Railway Company, the effect of which would be a violation of the contract with the S. and C. Company. The S. and C. Company moved for an injunction to restrain the S. and B. Company from holding a meeting to sanction the agreement. The court refused to interfere, as it was not clear that the contract with the S. and C. Company was valid, and as the loss of the S. and B. Company from not entering into the agreement with the L. and N. Company might be greater than their loss from violating the contract with the S. and C. Company. *The Shrewsbury and Chester R. Co. v. The Shrewsbury and Birmingham R. Co.*, 171.
2. *Restraint of Contract.*] The court will, where the necessity of the case requires it, interfere to prevent the defendant from affecting property in litigation by contracts, or conveyances, or other acts. *Ib.*
3. *Jurisdiction to enjoin Dividend.*] By their acts of Parliament, the Monmouthshire Railway and Canal Company were empowered to make a new railway, with branches, and to improve their existing railways, and to adapt them to the use of locomotive engines, which the company were required to provide, and a time was limited for the completion of the works. The works were not completed in pursuance of the requisitions of the act of Parliament, in consequence, as was alleged, of want of funds :—
Held, under the circumstances, that the court had not jurisdiction, at the suit of a shareholder, to restrain the company from declaring a dividend until the works were all completed, there being no provision in the acts to that effect. *Brown v. The Monmouthshire R. & C. Co.*, 113.
4. *Equitable Waste — Ornamental Timber.*] In cases of equitable waste in respect of ornamental timber, a court of equity confines its protection to timber proved to have been planted or left standing for ornament; and if the settler of the property has defined a standard of beauty or ornament, the court will interfere to prevent its being impaired. Therefore where property was settled by deed to the use of trustees and successive tenants for life, with power to cut timber thereby expressed to be then standing and not being ornamental to the mansion-house or the pleasure grounds attached thereto, or any of the views or prospects of the same, of which timber it was thereby declared enough should always remain to preserve the beauty of the place unimpaired, the court, on the motion of the tenants for life in remainder, granted an injunction to restrain the tenant for life in possession from cutting certain timber which the evidence showed could not be cut without impairing the beauty of the place as it stood at the date of the settlement; but ordered the plaintiffs to give security to the tenant for life in possession for any loss or damage which he might sustain by reason of his being restrained from completing his contracts for the sale of such timber; and offered the latter a reference to the master to inquire what timber could be cut without impairing the beauty of the place as aforesaid. *Marker v. Marker*, 95.

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Chancery.

with a power of sale, cannot be called on to submit to a decree for sale, but he may proceed by bill for foreclosure; and he is entitled to a decree in the common form for an account, and, in default of payment, for foreclosure. *Wayne v. Hanham*, 147.

2. *Trustee Act*, 1850 — *Vesting Order*.] Petition by the personal representative of a deceased mortgagee in fee, stating that the mortgagee had died intestate as to the mortgage premises, and without having entered into possession, or into the receipt of the rents and profits thereof; that it was unknown who was the heir of such mortgagee, and praying an order vesting the legal estate of the mortgage premises in the petitioner, as the person entitled to receive the mortgage debt. Order refused, the court holding that the case did not fall within the provisions of the act. *Meysick*, in re, 144.

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NUISANCE.

Brick-burning — Injunction.] A land owner having built a house, and laid out grounds, shrubberies, and gardens adjacent thereto, before 1829, and having let the same to a tenant, the house was continuously occupied as a dwelling-house from that time down to 1851. Early in 1850 the owner of adjoining land began to manufacture bricks of the clay or earth of the same land, by burning in clump, which was erected within 144 feet of the dwelling-house, and within fifteen feet of the stable. A bill was filed by the land owner and his tenant, praying an injunction to restrain the neighboring land owner from proceeding with the manufacture of the bricks:—

Held, that the brick-making was a private nuisance, and (as the parties on both sides requested the court not to send a case for the opinion of, or an action to be tried by, a court of law) an injunction must be granted to restrain the defendant from burning bricks on his ground, so as to occasion damage or annoyance to the plaintiffs, or either of them, as owner or occupier of the house and grounds, until further order. *Walter v. Selfe*, 15.

OFFICER OF ARMY.

Assignment of Pay.]

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PARTIES.

See INJUNCTION, 3. PLEADING.

PLEADING.

Parties — Misjoinder.] One of several trustees, upon a representation that the trust fund was required for payment of debts of the testator under whose will the trust arose, obtained from his co-trustees a power of attorney, by means of which he sold out the fund, and appropriated it to his own use. He afterwards died insolvent. One of the *cestuis que trust* took out administration to the insolvent, and then, in conjunction with the other *cestui que trust*, as co-plaintiffs, filed a bill to charge the estates of the deceased co-trustees of the insolvent with the loss of the fund, as having been occasioned by a breach of their trust. The bill was dismissed at the hearing, for misjoinder, and with costs as against those defendants who had taken the objection by their answer. *Griffiths v. Vanheythuyssen*, 25.

PRACTICE.

1. *Motion to dismiss — At what Period it may be made*.] The answer became sufficient on the 2d of August, and the four weeks allowed from that time to amend the bill, extra the vacation, expired on the 18th of November. The defendant served notice of motion to dismiss at half past seven o'clock on the evening of the 18th of November:—

Held, that the four weeks did not expire till twelve o'clock at night, and consequently that the notice of motion was given before the plaintiff was in default. Motion dismissed with costs. *Preston v. Collett*, 70.

Chancery.

2. *Amendments.*] The affidavits in support of the plaintiff's motion for leave to amend his bill under the 68th general order of May, 1845, must not be affidavits of opinion merely, as to the materiality of the proposed amendments, and as to due diligence having been used, but the affidavits must also state circumstances from which the court itself may draw its own conclusion upon those matters. *Stuart v. Lloyd*, 1.
3. *Second Rehearing.*] Leave to move for a second rehearing by the great seal may be applied for *ex parte*, and without notice. The Winding-up Acts do not limit the time within which notice must be given of motion for a second rehearing by the great seal. A second rehearing allowed under special circumstances, and Lord Cottenham's judgment reversed. *Besley*, *ex parte*, 149.
4. *Exceptions.*] The notice of setting down exceptions to a further answer must state the exceptions to which the plaintiff requires a third answer. *Tanner v. Stratton*, 61.
5. *Exceptions.* Where exceptions to a master's report relate only to matters of law, and not to matters of fact, the court will not make any order on the exceptions, but express its decision by way of declaration. *Ashlon v. Langdale*, 80.
6. *Agreement to compromise a Suit — Stay of Proceedings.*] The plaintiffs filed their bill against A and the executors of B, to charge A and the estate of B with the loss occasioned by a breach of trust on the part of A and B. After replication filed, the plaintiffs and A entered into an agreement to compromise the suit. On drawing up the agreement, the plaintiffs refused to complete, unless the representatives of B were joined as parties. A, on the other hand, insisted that it was no part of the understanding that they were to be parties, inasmuch as the estate of B had become the subject of a decree of the court in an administration suit. The plaintiffs then set down the cause for hearing; whereupon A presented a petition praying that the cause might not be heard, and that, in pursuance of the agreement for compromise, the bill might be dismissed:—
The court dismissed the petition, with costs, holding, first, that it was wrong in point of form, the proper proceeding to enforce the agreement being by independent bill for specific performance, and not by interlocutory proceeding in the suit; and, secondly, that the agreement appeared to be one which the court could not enforce even on bill filed. *Askew v. Millington*, 165.
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RAILWAY COMPANY.

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SPECIFIC PERFORMANCE.

Bill to enforce Agreement to compromise Suit.]

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STATUTES CITED AND EXPOUNDED, &c.

9 Geo. 2, c. 36. Statutes of Mortmain,	80
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STATUTE OF MORTMAIN.

1. *Shares in incorporated and unincorporated Companies.*] Shares in incorporated companies having interests in land, as canal companies, railway companies, &c., constituted by acts of Parliament, under which the shares are declared to be personal estate, are not within the Mortmain Act, 9 Geo. 2, c. 36. *Ashton v. Langdale*, 80.
2. *Debentures.*] Debentures given by incorporated companies having interests in land, which merely contain a personal obligation, and do not convey the undertaking, tolls, &c., to the holder, are not within the Mortmain Act. *Ib.*
3. Shares in an unincorporated banking company, which was authorized to hold lands by way of mortgage, and might have had interests in lands, and which had been constituted by deed of settlement, under which the shares were declared to be personal estate, held not to be within the Mortmain Act. *Ib.*
4. *Railway Scrip.*] Railway scrip is not within the Mortmain Act. *Ib.*
5. *Railway Mortgages.*] Mortgages given by a railway company of the undertaking and tolls, rates, and sums arising by virtue of the act of Parliament under which it was constituted, held to be within the Mortmain Act. *Ib.*

STOCK.

Transfer to new Trustees.]

See TRUSTEE, 6.

TRUSTEE.

1. *Power to appoint new Trustee.*] By the terms of a settlement, power was given to appoint a new trustee in the place of any trustee who should become incapable to act: —
Held, that the word "incapable" had reference to personal incapacity, and that the power could not be exercised where a trustee, having become bankrupt, had been indicted for not surrendering, and had gone abroad. *Watts*, ex parte, 67.
2. *Semble*, that a vesting order, under sect. 10 of the Trustee Act, 1850, is inapplicable where one only of several trustees is out of the jurisdiction, and a new trustee is appointed in his place, the other trustees remaining. *Ib.*
3. *Appointment of new Trustee.*] Precautions required to be observed before the court will appoint new trustees under the Trustee Act, 1850, in cases where the trust deed has given power to a party to appoint, and that party refuses to exercise such power. *Hodgson's Settlement*, 182.
4. *Removal of Trustee.*] The 32d section of the Trustee Act, 1850, does not give jurisdiction to the court to remove a trustee who is willing to act. *Ib.*
5. *Charity — Appointment of Trustees.*] Appointment of trustees of a charity for the benefit of the poor of a parish held to be illegal and void where the deed creating the charity did not prescribe any particular mode of appointing new trustees; but it appeared that the estate belonging to the charity was bought with the parish money, and that the parishioners had been accustomed, for many years after the institution of the charity, to exercise a control over its affairs, in the election of trustees and otherwise, but that the trustees in question had been elected and nominated by the survivors of former trustees without the intervention of the parishioners, and under a mode of proceeding of comparatively modern date. *Attorney General v. Dalton*, 5.
6. *Legal Estate — In whom vested.*] The legal estate of charity property, under particular circumstances, presumed to be vested in the existing trustees. *Ib.*
7. *Transfer of Stock.*] New trustees of stock appointed under the 13 & 14 Vict. c. 60, have not the right, under the act, to a transfer of the stock directly to them; but the right only to call for a transfer from the old trustees, or, if they should be incapable or refuse to make such transfer, to exercise the powers of the act which provides for such cases. *Smythe's Settlement*, in re, 107.
8. *Mortgagee — Trustee.*] H. and other persons were trustees of a chapel, upon trust to permit such persons to preach therein as were appointed by the conference of Wesleyan Methodists, and with powers to mortgage. They mortgaged the chapel

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to H. Afterwards a larger chapel was built, of which C. was a trustee, upon similar trust; and the new chapel was mortgaged to H. H. died, leaving C. his executor. C. and several other trustees, having quarrelled with the conference, formed, as was alleged, a scheme to wrest the chapels from the preachers appointed by the conference; and, accordingly, C., in default of payment, and in pursuance of his powers as mortgagee, put up the old chapel for sale, and it was sold to T., a trustee of the new chapel. C. also transferred the mortgage on the new chapel to L., who brought an ejectment. The preachers filed an information against all parties, alleging that the sale to T. was not valid or *bona fide*, and praying that the defendants might be restrained from allowing any persons to preach except those appointed by the conference, and that the ejectment might be restrained:—

Held, that C., though a trustee, had, as mortgagee, a title paramount, and both injunctions refused. *Attorney General v. Hardy*, 44.

9. *Liability as Contributory.*]

See WINDING-UP ACTS, 6.

10. *Charitable Use.*]

See CHARITY.

WASTE.

Destruction of ornamental Timber.]

See INJUNCTION.

WILL.

1. *Life Interest.*] A testator gave shares of the annual produce of his residue to each of his three children, and directed, that, after the decease of any one or two of them, such of the shares as belonged to the parent should go to the children of the parent; and after the decease of the survivor of his children, he gave the residue to his grandchildren. One of the children died, leaving issue, who died in the lifetime of one of the other children:—

Held, that the representatives of the issue were entitled to the share of the annual produce which belonged to the parent. *Homer v. Gould*, 62.

2. *Construction — Devise — Primary Fund for Payment.*] G. T. was entitled to a life interest in freehold and copyhold estates, and also in three sums of stock; the legal estate in the freeholds was vested in trustees, but the copyholds had never been surrendered to them, and many of the freehold and copyhold lands were let together; the three sums of stock were standing in the names of the trustees in the Bank of England. G. T. was also absolutely entitled in remainder to moiety of the freehold and copyhold estates, and in the stock. G. T., upon his second marriage, by a covenant and his bond, secured an annuity of 200*l.* a year to his wife for life, and by his will he confirmed the settlement, and said, "I charge all and every my freehold hereditaments and estate and moneys standing in my name in the public funds with the payment of the annuity, to my wife; and subject to the said annuity, I devise and bequeath the same freehold hereditaments and estate and moneys in the funds to my niece and godchild, S. Q., her heirs, executors, administrators, and assigns, with remainder to her two sisters, &c. All the rest and residue of my real and personal estate, subject as to my personal estate to the payment of my just debts, &c., and legacies, I devise and bequeath unto my wife, her heirs, executors, administrators, and assigns." The testator had no moneys standing in his name, and upon a suit by the devisee:—

Held, that the testator meant his interest in the stock standing in the name of the trustees, to which he was entitled in remainder:—

Held, also, that the personal estate, as the primary fund for payment of the annuity, was not exonerated by the charge made upon the freeholds and the moneys in the funds:—

Held, also, in the absence of any intention apparent on the will, that the word "estate" did not include the copyholds, and that they did not pass. *Quennell v. Turner*, 84.

2. *Construction — Vesting.*] A testator bequeathed his residuary personal estate to trustees, upon trust for A for life, and after the death of A the said trust money and income in trust for all and every the children of A, share and share alike, to

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the son or sons when they should have attained the age of twenty-one, and for the daughter or daughters at that age or marriage; with a gift over, if A should die without having a child, or, having any, such children should die, being sons before twenty-one, and daughters before twenty-one or marriage. A died, leaving an only child B, who died under twenty-one:—

Held, that the trust property had vested in B, so that the income between the death of A and the death of B belonged to B's estate. *Ridgway v. Ridgway*, 108.

4. *Construction — Estate.*] A gift by a will, within the operation of stat. 11 Will. 4 & 1 Vict. c. 26, of "all my estate and effects," unless restrained by the context, will pass after-acquired real estate of which the testator dies seized.

The testator, by his will, gave, devised, and bequeathed all his estate and effects, whatsoever and wheresoever, and of what nature or kind soever, unto W. L. J., such estate and effects to be paid, assigned, or transferred to the said W. L. J. upon his attaining the age of twenty-one years; and in the mean time, and until he should attain that age, the interest, dividends, or proceeds of such estate and effects, or so much thereof, or so much of the principal thereof, as in the discretion of the executors should be necessary for that purpose, should be applied towards the maintenance, education, and putting forth in the world of the said W. L. J. The testator then appointed executors, whom he named guardians of W. L. J., and authorized them to invest his said estate and effects on real or personal security, and to alter, vary, and transpose the investment thereof, according to their discretion, from time to time; and he directed them from time to time to repay and reimburse themselves out of his said estate and effects whatever costs and expenses might be incurred by them in the execution of his will. In the event of W. L. J. not attaining twenty-one, the testator gave, devised, and bequeathed unto his executors, or the survivor of them, all his aforesaid estate and effects:—

Held, that certain copyhold estates which the testator acquired after the date of the will, and of which he died seized to him and his heirs, passed under the will to W. L. J. and his heirs. *Stokes v. Salomons*, 133.

5. *Breach of Trust — Satisfaction.*] Stock was transferred into the names of three trustees, on trusts of a marriage settlement. There was a power to alter and vary securities with the consent of the husband and wife. All the trustees transferred 2000*l.*, part of the fund, to the husband, and the same was sold out, and the produce used by him and his copartners, one of whom was one of the trustees. Two of the trustees became bankrupt. The other trustee, who was the father of the wife, by his will, gave 6000*l.*, new 3*l.* 10*s.* per cents., to the trustees of the settlement. His will contained the following direction: "For giving my daughter her legacy of 6000*l.*, new 3*l.* 10*s.* per cents., I order and direct, that whatever foreign bonds A. B. & Co. should have of mine be sold, and the produce thereof, with my balance of accounts with the said house, shall be added, for purchasing the said legacy." The testator also directed his bankers to pay all his dividends, and his balance of accounts with them, to his wife during her life, after having paid his legacy and debts. A suit was instituted against the executor of this will for a replacement of the 2000*l.* out of the estate, and another suit was instituted by the same party against the executor for payment of the 6000*l.* legacy:—

Held, that the gift of the 6000*l.* was a satisfaction of the 2000*l.* and interest. *Bensun v. Nehemias*, 140.

WINDING-UP ACTS.

1. *Sale of Shares to Directors.*] B, an original promoter of a company, executed the deed of partnership for 100 shares; he subsequently obtained other shares, making in all 1000 shares. The provisions of the deed of partnership were not duly observed by the directors. B paid three calls, and received the only dividend ever made while he continued a shareholder; upon a fourth call, B, without reference to the forms of the deed respecting sales of shares, gave up 260 shares to the directors, which they agreed to purchase for the company, in consideration of a sum of money, and the amount of the fourth call. B afterwards sold the rest of his shares, and ceased to be a partner. The company was carried on for eight years after the sale of the 260 shares to the company, but it subsequently fell into difficulties, and in winding up the affairs of the company, under the 11 & 12 Vict. c. 45, and the 12 & 13 Vict. c. 108, it was desired to place B upon the list of contributories in

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respect of the 260 shares, on the ground that the transaction with the directors was not valid : —

Held, that the company, after having dealt with a shareholder, could not treat the transaction as void for a want of form, though not immaterial, which their own irregularities had rendered it impossible to observe; and the motion that the master might review his decision was refused, with costs to be paid out of the estate. *Bagge, ex parte*, 72.

2. *Liability of provisional Committee.*] The mere fact of a person consenting to be nominated a member of a provisional committee does not authorize the committee to pledge his credit. *Besley, ex parte*, 149.

3. *Liability, how not incurred.*] B. consented to be nominated a provisional committee-man of a projected company, upon an assurance that he would incur no liability, and would not be bound to take any shares; and he was nominated accordingly. By a letter to the secretary he afterwards declined to take up shares, and requested that his name might be taken from the list. The letter was laid before the managing committee, who resolved that the secretary should be instructed to inform B. that his wish should be complied with. This resolution was not communicated to B. After the scheme had been abandoned, B., in ignorance of the resolution, attended meetings, at which it was agreed to pay certain sums, and afterwards paid them, but upon the faith that no further claim would be made upon him : —

Held, that B.'s conduct prior to the abandonment did not render him liable to the creditors of the concern, or to contribute to the indemnity of those who were liable to the creditors; that the partial payments made by him after the scheme had been abandoned did not create a liability to make further payments; and that he was not properly on the list of contributories. *Ib.* [See also *Nicholay's Case*, 24.]

4. *What Companies are within the Act.*] *Quære*, whether an undertaking, in which no person became bound to take any shares, and no shares were allotted until after the undertaking had been abandoned, is within the Winding-up Act, 1849. *Ib.*

5. *Scripholders — Calls — Costs.*] A company was ordered to be wound up. No debts had been established. The master allowed the claims of creditors as claims only. The master, in settling the list of contributories, divided the same into several classes, one of which was of scripholders, who, before the order for winding up, received back part of the original deposits from the directors, upon their shares being cancelled : —

Held, that the master had jurisdiction to make a call upon the contributories in respect of the costs of proceedings in and about the winding up of the affairs of the company, although there had been no taxation of them, or adjudication upon them by the court : —

Held, also, that the master was right in making a call for contribution from scripholders who had received back part of their deposits on the cancellation of their shares. *Preece, ex parte*, 161.

6. *Liability for Calls.*] The registered holder of shares in a railway company, though a mere trustee, is, in the absence of any special contract to the contrary, alone liable to the company for calls on such shares; and the company have no remedy in equity for calls against the real or beneficial owner of such shares. *Newry, &c. R. Co. v. Moss*, 34.

7. *Call — When to be made.*] No call should be made on any contributory until it has been ascertained to which of the debts established such contributory is liable. *Uffill's Case*, 128.

8. *Call for Costs.*] Where no debts have been established against a contributory, though costs have been incurred in winding up, a call cannot be made on the contributory. *Hunter's Case*, 164.

9. *Liability of Executor.*] A director of a joint-stock banking company was the holder of twenty shares as a qualification for that office, and executed the deed in respect of them. The directors having subsequently agreed that each should take a number of additional shares, this director accordingly signed a letter agreeing to take 100 more shares, and gave a promissory note for them for 1000*l.* The deed was never executed in respect of these shares, nor were the shares themselves ever allotted. Debtor and creditor entries were made in the bank ledger concerning

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the dividends on the shares, and the interest on the note. The note, when due, was not honored. The master inserted the name of the executor of this director in the list of contributories in respect of the whole 120 shares, and, on appeal, his decision was affirmed. *Robinson*, ex parte, 38.

10. *Liability of Executors.*] Another director in the same company, having qualified in the same manner, and having agreed to take 500 additional shares under the same circumstances, as in the last case, and having given a promissory note for 500*l.*, afterwards, and before the note became due, died, no shares being allotted. After his death his executors, in 1842, applied to the directors to know the number of shares held by him, and they were told twenty shares, which twenty shares the executors sold and transferred in due form. In 1843 the directors cancelled the 500 shares and the note:—

Held, that the executors were not properly on the list of contributories in respect of these 500 shares. *Meux's Executors*, ex parte, 40.

11. *Executor — Master's Jurisdiction to review.*] A B was the proprietor of thirty shares in a joint-stock banking company. He died in 1838, having by his will appointed C D and E F executors, who proved the will, and in 1840 the probate was entered in the books of the bank. The name of C D appeared as executor on the dividend lists of 1845 and 1846, but on the warrants his name appeared without any addition, and notices were addressed to him alone. In his letters to the secretary he spoke of himself as executor of A B. In 1845, he, in his character of executor, transferred fifteen of the shares to a purchaser. The master had placed C D's name alone on the list of contributories, excluding E F, but on reviewing his decision he included E F:—

Held, that, under the 17th section of the act of 1849, the master had jurisdiction to review his decision, and that the name of E F was properly on the list. *Croffield*, ex parte, 125.

12. *Time for second Rehearing.*]

See PRACTICE, 3.

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Common Law, Admiralty, &c.

□ In this Index, the cases in the Ecclesiastical and Admiralty Courts are denoted by the abbreviations (ec.) and (ad.) All other cases are in the Common Law Courts.

ACCEPTANCE.

Payment upon forged Acceptance.]

See BILL OF EXCHANGE, 1.

ACCORD AND SATISFACTION.

How it should be Plead.]

See PLEADING, 9.

ACKNOWLEDGMENT.

Of Payment, under Statute of Limitations.]

See LIMITATIONS, STATUTE OF, 1, 2, 3.

ACTION.

1. *Infringement of Copyright.]* B. composed an opera in Milan, and assigned it there, according to the law of Milan, to one R., who assigned it in England, according to the English law, to the plaintiff, who published it in this country before any publication abroad :—

Held, that the plaintiff might maintain an action for the infringement of the copyright of such work. *Boosey v. Jefferys*, 479.

2. *Parties—Joint Contract.]* The plaintiff, acting on behalf of the members of an orchestra, to which he himself belonged, signed a proposal, “on behalf of the members of the orchestra,” to continue their services, provided the defendant would guaranty certain salary then due to them. The defendant accepted this proposition, but failed to pay the salary due. The plaintiff alone brought an action, for the whole money due to himself and the rest, and stated the contract to be with himself and the rest. The jury found that he acted on behalf of himself as well as the rest :—

Held, that the contract was joint, and that he could not recover. *Lucas v. Beale*, 358.

3. *Right of, for flowing Land.]*

See FLOWAGE, 1.

4. *Form of, Trespass or Case.]*

See TRESPASS, 1.

5. *To recover Money.]*

See USURY, 4.

AFFIDAVIT.

County Court Act—Suggestion to deprive Plaintiff of Costs—Averment of Residence within twenty Miles.] An affidavit for a suggestion to deprive a plaintiff of costs under the County Courts Act, stated as follows: “That the plaintiff now dwells, and at the time of the commencement of this action dwelt, at Birmingham, in the county of Warwick, which is within twenty miles from Bilston, the place where the defendant now dwells, and also within twenty miles from Wolverhampton, in the county of Stafford, the place where the defendant dwelt and carried on his business at the time this action was commenced” :—

Held insufficient. *Fry v. Whittle*, 457.

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AIR.

Right in.]

See EASEMENT, 1.

ALTERATION OF INSTRUMENTS.

1. *Altered Deed — How far Valid.*] Where a deed is altered in a material part it ceases to have any new operation, and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire ; but it may still be given in evidence to prove a right or title created by its having been executed, or to prove any collateral fact. *Agriculturist, &c. Co. v. Fitzgerald*, 211.
2. Where in an action of debt for calls, under 7 & 8 Vict. c. 110, s. 55, it appeared that the deed of settlement of the company had been executed by the defendant as a shareholder, but there was an unexplained erasure of the name of another person who had signed it as a shareholder, it was held that the deed might be given in evidence to prove the fact of the defendant being a shareholder. *Ib.*
3. *Quere*, whether such an erasure could in any mode affect the defendant's liability under the deed. *Ib.*

AMENDMENT.

See NEW TRIAL, 3, 5.

ANNUAL OFFICER.

See OVERSEER, 1.

ANNUITY.

1. *Apportionment — Queen Dowager — Mandamus — Consolidated Fund — Lords of Treasury.*] By the 1 & 2 Will. 4, c. 11, King William the Fourth was empowered, by indenture, to grant to the queen an annuity of 100,000*l.*, to commence from the death of the king, and to be paid out of the consolidated fund. By indenture, dated the 6th of April, 1832, in pursuance of this act, the king granted to trustees in trust for her majesty the annuity of 100,000*l.*, and directed that it should be paid at the receipt of the exchequer, and that the auditor of the exchequer should issue debentures for paying the same, and that the commissioners of the treasury should cause the said sum of 100,000*l.* to be paid out of the consolidated fund. By the 4 & 5 Will. 4, c. 15, the office of auditor of the exchequer is abolished, and in all cases of grants by Parliament charged on the consolidated fund, instead of debentures being issued by the auditor, the commissioners of the treasury are required to issue warrants for the payment of the moneys granted : — *Held*, that a *mandamus* would lie to the lords of the treasury to issue such a warrant. *Regina v. Lords of the Treasury*, 277.
2. The annuity to the queen was, by the act of Parliament and the indenture granting it, "to commence and take effect immediately after the decease of his majesty, and to continue from thenceforth for and during the natural life of her majesty, and to be paid and payable at the four most usual days of payment, viz., the 31st of March, the 30th of June, the 30th of September, and the 31st of December, by even and equal portions, the first payment to be made on such of the said days as should first and next happen after the decease of his majesty." King William the Fourth died on the 25th of June, 1837, and upon the 30th of the same month a full quarter's annuity was paid to the queen dowager. The queen dowager died on the 2d of December, 1849 : — *Held*, that no apportionment of the quarter's annuity which would have been payable on the 31st of December could be made in her favor. *Ib.*
3. *Held*, also, that the fact of a whole quarter's annuity having been paid on the 30th of June, 1837, would not have prevented a *mandamus* being issued to compel payment of a proportional part of the last quarter, up to the day of her death, if the annuity had been apportionable. *Ib.*
4. The same act of Parliament and indenture settled upon the queen dowager Marlborough House during her life, and limited an interest therein to her executors for

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a year after her death, and the indenture (to which the queen was a party) expressed that the annuity was in lieu of dower:—

Held, that these circumstances did not show that the annuity was apportionable. *Ib*.

APPORTIONMENT.

Of Annuity.]

See ANNUITY, 2.

APPRENTICE.

1. *Construction of Indenture.*] By an indenture of apprenticeship, an infant, with the consent of his father, put himself apprentice to a person therein described as "an auctioneer, appraiser, and corn-factor," "to learn his art and with him after the manner of an apprentice to serve" for a specified period. The father was party to the indenture, and entered into the usual covenants for the performance of its terms by the apprentice:—

Held, that the fact of the master's having, during the continuance of the apprenticeship, relinquished the trade of corn-factor, was an answer to an action of covenant brought by him against the father for a desertion of his service by the apprentice; and this, though the father had by parol consented to the discontinuance of that trade, and allowed the son to continue to serve after it. *Ellen v. Topp*, 412.

2. *Sed semble*, that if the apprentice had served the whole period agreed on, and had the benefit of instruction as such in two of the trades, it would be no answer to an action by the master for the apprentice fee, that he had during the apprenticeship discontinued the third trade. *Ib*.

3. *Indenture — Allowance — Metropolitan Police Magistrate.*] By the 3 & 4 Will. 4, c. 63, s. 3, indentures for binding parish apprentices within any city, &c., are to be allowed by two justices, one acting for and on behalf of the county, and the other for and on behalf of the city, &c., within the limits of which the child is bound. By the 2 & 3 Vict. c. 71, s. 14, a single police magistrate sitting at a police court may do any act directed to be done by more than one justice. A pauper was bound apprentice by the parish of A, which was situate within the city and liberty of Westminster, into the parish of B, in the county of Middlesex. Justices for the county of Middlesex have concurrent jurisdiction, and usually act in the liberty of Westminster:—

Held, that the indenture of apprenticeship was properly allowed by a single police magistrate. *Regina v. St. George*, 302.

ARBITRATION.

1. *Construction of Award.*] A railway company being about to construct their line over certain land of W. C., it was, by agreement, referred to an arbitrator to fix the amount of money to be paid by the company to W. C. as the price of the land to be purchased, as well as for the injury done to his remaining estate by severance or otherwise, and to determine what bridges, arches, culverts, &c., should be made. The arbitrator awarded 7900*l.* as the amount of compensation, and directed what works should be constructed. The money was paid to W. C., and the works directed were done:—

Held, that this sum covered all damage known or contingent by reason of the construction of the railway on the lands purchased, and all other damage arising from the construction of the railway at other places, which was apparent and capable of being ascertained and estimated when the compensation was awarded; but that it did not include any contingent and possible damage which might arise afterwards by the works of the company at other places which could not have been foreseen by the arbitrator. *Laurence v. Great Northern Railway Co.*, 265.

2. *Sufficiency of Award.*] An award made in an action, in which A and B were plaintiffs, and C defendant, ordered that the defendant should pay the plaintiffs a certain sum of money, and directed that the defendant should pay the costs of the reference and award (not saying to whom the costs were to be paid.) After more than two years from the making of the award, one of the plaintiffs demanded payment of the amount awarded from the defendant. The defendant did not pay:—

Held, that the plaintiffs were entitled to an attachment to compel payment, although

- the plaintiffs had given no explanation of the delay in coming to the court. *Bailey v. Curling*, 201.
3. *Held*, also, that the direction in the award as to the costs was sufficiently certain, as the award could not reasonably be construed to mean that the defendant should pay costs to any one but the plaintiffs. *Ib.*
 4. *Held*, further, that the demand made by one only of the two plaintiffs was a sufficient demand to bring the defendant into contempt. *Ib.*
 5. *Sufficiency of Award.*] An arbitrator had to decide upon the depth at which the defendant was entitled to keep a weir which penned back the water of a river so as to interfere with the plaintiff's mill higher up the stream, and to determine all manner of rights of water between the parties. The arbitrator awarded that the defendant was entitled to maintain his weir to the depth of fourteen inches and no more, and added that he had caused marks to be placed, which marks pointed out the depth the defendant was to keep his weir, and that a plan annexed to the award correctly defined and described the depth of the weir and the marks:—
Held, that the award sufficiently pointed out the depth of the weir, and was sufficiently precise, although it made no provision for the case of floods, or for regulating the depth of the paddle in the defendant's weir, by which the water could be let off. *Johnson v. Latham*, 203.
 6. *Part of Plan referred to.*] There were figures on the plan which referred to written descriptions at the foot of the plan, delineating certain places. Without these descriptions the plan was unintelligible:—
Held, that these written descriptions were part of the plan and incorporated with the award. *Ib.*
 7. *Setting out Pleadings in Award.*] An action on the case for obstructing the plaintiff's right to the water was one of the matters referred:—
Held, that it was not necessary to set out the pleadings in the award. *Ib.*
 8. *New Award.*] By the submission, the costs of the reference and award were in the arbitrator's discretion, and there was also a clause empowering the court, in the event of any application being made to them, to send the matters referred, or any of them, back to the arbitrator for reconsideration. The original award, after deciding all matters in difference, added, that for the better defining the height of the weir such permanent marks should be placed as B should direct. This direction being held bad as a delegation of authority, the court remitted the award to the arbitrator for the purpose of reconsidering the prospective directions that should be given for the purpose of defining the depth at which the defendant might maintain his weir. The arbitrator, without calling the parties before him, made a new award, repeating *verbatim* the terms of the old award, that the plaintiffs should pay the costs "of this my reference and of this my award," and as to all other matters, except as to the prospective directions, on which he awarded as above stated:—
Held, that the arbitrator had adopted a proper course in making a new award, repeating the old adjudication as to the matters not sent back to him, and the adjudication on the matters remitted for consideration. *Ib.*
 9. *Rehearing.*] *Held*, also, that it was not necessary for the arbitrator to give the parties an opportunity of being heard before him, either with respect to the prospective directions, or with respect to the costs of the second reference and award, as incidental thereto. *Ib.*
 10. *Discretion over Costs.*] *Semble*, where the submission places the costs of the reference and award in the discretion of the arbitrator, and contains a clause giving the court power to remit the matters or any of them back to the arbitrator, and the award is sent back to him on any point, without any new direction as to costs, the arbitrator has a discretionary power over the costs of the second reference and award. *Ib.*
 11. *New Taxation.*] The costs had been taxed before the original award was sent back. After the second award was made, the defendant demanded the same costs without any new taxation:—
Held, that by the reference back the *allocatur* became null, and that there ought to have been a fresh taxation of costs after the making of the new award, before any demand for costs could be enforced. *Ib.*

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ARBITRATOR.

No Power to administer Oaths.]

See PERJURY.

ARGUMENTATIVENESS.

See PLEADING, 2.

ASSAULT.

Jurisdiction of Justices — Praying Sureties of the Peace.] An information made before a magistrate stated that the informant, had been assaulted and beaten by another person, and prayed that said person might be bound over to keep the peace towards him. On the magistrates', before whom the case was heard, proceeding to deal with the merits of the question of the assault, the informant protested against their adjudicating upon it:—

Held, that the justices had no jurisdiction to convict summarily the offending party of the assault against the will of the informant, as, under the stat. 9 Geo. 4, c. 31, s. 27, the justices have no jurisdiction to convict of an assault, unless the party aggrieved complain of that assault before them, with a view to their adjudicating upon it. *Regina v. Deny*, 296.

ASSIGNEE.

Liability — Messenger.] A creditor's assignee in insolvency, under 5 & 6 Vict. c. 116, s. 1, and 7 & 8 Vict. c. 96, s. 4, is not liable for the messenger's fees, except upon an express contract. *Hamber v. Hall*, 382.

ASSUMPSIT.

Money had and received — Waiver of Trespass.] A and B (the defendants) went together to the house of the plaintiff's mother, and A seized there a sum of money belonging to the plaintiff. There was some evidence of A and B having gone with the intent to get the money, but there was no evidence that B went into the house. They subsequently paid the money into a bank to their joint account:—

Held, that the plaintiff might waive the trespass, and maintain an action for money had and received against the two defendants. *Neat v. Harding*, 494.

ASSURANCE.

See USURY.

ATTACHMENT.

See ARBITRATION, 2.

ATTORNEY.

1. *Bill of Costs.]* The defendant was a member of the provisional committee of the Northampton, Lincoln, and Hull Railway Company. The plaintiff, an attorney, who had been employed by the company, delivered his bill of charges, headed, "Northampton, Lincoln, and Hull Railway to R. H. Daubney, debtor:—" —

Held, that it sufficiently charged the defendant within the meaning of the statute 6 & 7 Vict. c. 73, s. 33. *Phipps v. Daubney*, 240.

2. *Delivery.]* It is not a sufficient delivery of a bill of costs within the statute, for the attorney to show it to the party charged, and then to take it away again, unless the attorney showing it, intends to leave it with the party, and merely takes it back at his request. *Ib.*

ATTORNEY'S BILL.

Taxation of:]

See COSTS, 6, 7.

AVERAGE.

See INSURANCE, 1.

Common Law, Admiralty, &c.

AWARD.

See ARBITRATION.

BAILMENT.

Determination of.]

See LARCENY, 1.

Duty of Bailor.]

See PLEDGE.

BANKER.

Liability for paying forged Paper.]

See BILL OF EXCHANGE, 1.

BANKRUPTCY.

1. *Refusal of Certificate.]* When the Court of Bankruptcy has refused to grant a certificate of conformity on the ground that the bankrupt has committed any of the offences enumerated in sect. 256 of stat. 12 & 13 Vict. c. 106, the granting of a certificate to the assignees, or a creditor, upon which a writ of execution may be issued against the body of the bankrupt, in pursuance of sect. 257, is a ministerial act, and being for the purpose of enforcing payment of the bankrupt's debts, it may be granted from time to time upon the application of the assignees or creditors. *Cowgill*, in re, 270.
2. *Appeal to Queen's Bench.]* The Court of Queen's Bench has no power to inquire into the grounds upon which a certificate of conformity was refused by the Court of Bankruptcy. *Ib.*
3. 12 & 13 Vict. c. 106 — *Reputed Ownership.]* Under the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, goods and chattels in the reputed ownership of a bankrupt do not pass to his assignees by the adjudication of bankruptcy under sect. 141; in order to divest the bankrupt's property in such goods, the Court of Bankruptcy must make an order to sell and dispose of them under the 125th section: *per curiam*; *dubitante*, Platt, B. *Heslop v. Baker*, 555.
4. *Quere*, whether such an order is final and conclusive in a court of law, where the claimant of the goods does not petition under sect. 12. *Ib.*
5. *Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106 — Arrangement by Deed.]* The creditors of a trader unable to meet his engagements have no power under the 34th head of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, to enter into an arrangement with the trader, whereby a certain sum in the pound is to be paid to each of the creditors, and the surplus of his assets given to the trader, such a deed should distribute his estate among his creditors. *Drew v. Collins*, 540.
6. *Pleading.]* A plea of an arrangement by deed under the head of the statute should allege that the party was a trader for six calendar months preceding his suspension of payment. *Ib.*
7. *Partner's liability for Debts of Company.]* A member of a banking company, established under 7 Geo. 4, c. 46, cannot be proceeded against in bankruptcy for a debt due from the company, no judgment for such debt having been recovered against the public officer of the company, although the company may have ceased to carry on business, and an order have been obtained for winding it up under 11 & 12 Vict. c. 45, prior to such proceedings in bankruptcy. *Ex parte Wood*, 1 Mont. D. & D. 92; s. c. 9 Law J. Rep. (n. s.) Bankr. 20, overruled. *Davidson v. Farmer*, 391.
8. A fiat issued against the plaintiff, on the 20th of July, 1849, upon a debt due from a banking company, in which he was a member, to G., the petitioning creditor, without any judgment having been obtained against the public officer, and a warrant of seizure in the ordinary form was issued to F., the messenger, dated the 30th of July. The creditors' assignee was appointed August 21. The 12 & 13 Vict. c. 106, came into operation October 11, and on the 18th of October a seizure of the plaintiff's goods was made by the messenger F. under the said warrant:—*Held*, that the fiat was invalid, and that either the petitioning creditor or the messenger was liable in trover for the wrongful seizure, but the court declined to deter-

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mine which of the two was liable, as it was not required by the case submitted for their opinion. *Ib.*

9. The Isle of Man is not within the United Kingdom; and therefore a person residing there at the time of an adjudication of bankruptcy against him has three months within which he may contest the validity of the fiat or petition for adjudication, under 5 & 6 Vict. c. 122, s. 24, or 12 & 13 Vict. c. 106, s. 233. *Ib.*

BARON AND FEME.

See HUSBAND AND WIFE.

BASTARDY.

Validity of Order of Maintenance.] An order of maintenance ordered a person, as putative father, to pay a weekly sum for the maintenance of a bastard child from the birth of the child. As the application for the order was not made until more than two months after the birth, the order was clearly bad as to the period between the date of the birth and the time of applying for the order. Notice of abandonment of all claim under the order for payment anterior to the date of the order had been served on the putative father:—

Held, that the order was valid, and might be enforced against the putative father in respect of the weekly payments which became due after the date of the application to the magistrates. *Regina v. Green*, 197.

BENEFICE.

See SEQUESTRATOR.

BILL OF EXCHANGE.

1. *Payment on a forged Indorsement.*] If a bill of exchange, made payable to order, be accepted payable at the acceptor's bankers, and the indorsement of the payee be forged, and the bankers pay the bill to a party presenting it for payment, they are guilty of no breach of duty towards the acceptor in making the payment; but they are not at liberty to charge the amount of the bill in account against him, although the payee be a stranger to them, and they have no immediate means of ascertaining the genuineness of his handwriting, and have dealt with the bill in the ordinary course of business. *Roberts v. Tucker*, 236.
2. *Semble*, the bankers have a reasonable time to inquire into the genuineness of the indorsements of strangers necessary to make out the title to the bill. *Ib.*
3. *Evidence — Pleading — Onus Probandi — Fraud — Consideration.*] In an action by the indorsee against the acceptor of a bill of exchange, to which the defendant pleads that the bill was obtained from him by fraud, and was indorsed to the plaintiff without consideration, to which the plaintiff replies *de injuria*, although the plea would not be good without this latter averment, proof of the former turns on the plaintiff the *onus* of proving that he gave consideration for the bill. *Harvey v. Towers*, 531.
4. Under such circumstances the judge determines whether there is evidence of fraud to go to the jury, and gives them a contingent direction, that if they think the fraud proved, the plaintiff is bound to satisfy them that he gave consideration for the bill. *Ib.*
5. *Jurisdiction in Action upon.*

See COUNTY COURT, 1, 2. PROMISSORY NOTE.

BOND.

See OVERSEER, 2.

BONUS.

See USURY.

BOTTOMRY BOND.

Duty of Lender — Bond pronounced against.] A British ship, being damaged, was repaired at Elsinore, where she arrived on the 18th of October. S. & Co. under-

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took the management of and ordered the repairs, and corresponded with the owner of the ship and part owners of the cargo, but gave no intimation to them or the master of their intention to take a bottomry bond as a security, for many weeks, and only just before the ship sailed: bond pronounced against, with costs, on the ground that the repairs were ordered, in the first instance, on personal credit, and that S. & Co. should have given the master and owners immediate notice of their intention to take a bond. *The Wave*, (AD.) 589.

BURDEN OF PROOF.

Per Alderson, B. The *onus probandi* does not always lie on the party who asserts the affirmation of the issue; for when a negative averment is necessary to make a pleading good, the *onus* of proving that averment lies on the party who makes it. *Harvey v. Towers*, 531.

BURGESS ROLL.

See TAXES, 1, 2.

CALLS.

1. *Power to make Calls — Condition precedent.*] The 22d section of the Waterford, Wexford, &c., Railway Act enacts that when 1,500,000*l.* shall have been subscribed, it shall be lawful for the company to put in force all the powers of the act and of the acts therein recited, as regards that portion of the said railway situate, &c.: —

Held, that the raising of this sum was not a condition precedent to the power of the company to make calls, but only to their exercising the compulsory powers of taking lands, &c. *Waterford, &c., Railway Co. v. Dalbiac*, 455.

2. *By Instalments.*] *Held*, on error, that a call payable by instalments is valid. *London, &c., Railway Co. v. McMichael*, 459. *Birkenhead, &c., Railway Co. v. Webster*, 461. *Ambergate Railway Co. v. Norcliffe*, 461.

3. *Action for.*] A joint-stock company, registered under 7 & 8 Vict. c. 110, cannot maintain an action for calls until they have obtained a certificate of complete registration, and a plea that they had not obtained such a certificate, is an answer to the action. But this defence will not arise under a plea of never indebted, or a plea traversing that the plaintiffs were a completely registered company. *Agriculturist, &c., Co. v. Fitzgerald*, 211.

CANDIDATE.

Liable for Costs of contesting Election.]

See ELECTION, 2.

CASE.

When the proper Form of Action.]

See TRESPASS, 1.

CASES APPROVED, OVERRULED, &c.

Abbey v. Petch, 8 Mees. & Wels. 419, disapproved. 453.

Boosey v. Purday, 4 Exch. R. 145, overruled. 479.

Corder v. The Universal Gas Light Co., 6 Com. B. 199, affirmed. 529.

Street v. Blay, 2 B. & Ad. 456, commented upon. 338.

Willis v. Newham, 3 Younge & Jervis, 518, overruled. 514.

Wood, ex parte, 1 Mont. D. & D. 92, overruled. 391.

CERTAINTY.

1. *Of Award.*]

See ARBITRATION, 5, 6.

2. *In Pleading.*]

See PLEADING, 4, 5.

CERTIFICATE.

1. *In Bankruptcy.*]

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See BANKRUPTCY, 1, 2

2. *Of Registration.*]

See CALLS, 3.

CERTIORARI.

1. *To remove Order of Sessions — Affidavit of Service on Justices — Justices present at the Sessions — Justices Names appearing in Caption of Order.*] The affidavit of service of notice of an intention to apply for a *certiorari* to remove an order of sessions, under the stat. 13 Geo. 2, c. 18, s. 5, stated that the notice was served on A B and C D, two of the justices of the peace in and for the county of S., and stated that the deponent was present at the Quarter Sessions on a particular day, "and did then and there see the said A B and C D, acting as justices of the peace for the said county of S., at the said General Quarter Sessions of the Peace." The order of sessions, which purported to be made on the day to which the affidavit referred, contained in the caption the names of A B and C D, as two of the justices before whom the sessions were holden.

The court quashed the *certiorari*, on the ground that the affidavit did not show that A B and C D were two of the justices by and before whom the order was made, and that no presumption could be drawn that they were present when the order was made from the circumstance of their names appearing in the caption. *Regina v. St. James*, 305.

2. *To remove Indictment — Application by one Defendant — Recognizance to pay Costs.*] The court will grant a *certiorari* to remove an indictment for conspiracy, on the application of one of the several defendants, without the consent of the others, if that defendant will enter into a recognizance to pay costs if either himself or any of the other defendants are convicted. *Regina v. Foulkes*, 301.

CHARITABLE ASSOCIATION.

Alteration of Rules.]

See MEETINGS.

CHURCH.

See SEQUESTRATOR.

CHURCH RATES.

See TRESPASS, 2.

COLONIAL LAW.

See FOREIGN LAW.

COMPENSATION.

See ARBITRATION, 1.

For Land taken by Railway.]

See LANDS CLAUSES CONSOLIDATION ACT, 2, 4, 5.

COMPULSORY POWER.

See LANDS CLAUSES CONSOLIDATION ACT, 2. EJECTMENT, 1, 2.

CONDITION PRECEDENT.

See CALLS, 1.

CONFIDENCE.

Breach of.]

See PLEADING, 1.

CONSEQUENTIAL DAMAGES.

See INSURANCE, 2.

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CONSIDERATION.

1. *Want of—How pleaded.*]

See PROMISSORY NOTE, 3, 4. GUARANTY, 1.

2. *What a good Consideration.*]

See PLEADING, 1.

CONSPIRACY.

Indictment—When barred.] The 3 & 4 Will. 4, c. 53, s. 120, enacts, that all suits, indictments, or informations exhibited for any offence against that or any other act relating to the custom in any of his majesty's courts of record at Westminster, shall be brought within three years after the date of the commission of the offence:—

Held, that this was confined to indictments to be brought under sects. 75 and 112, in the name of the attorney general, in one of the courts of record at Westminster, and did not apply to an indictment preferred at the assizes for a conspiracy to defraud the queen of certain duties, which was an offence at common law. *Regina v. Thompson*, 287.

CONSTRUCTION.

See CONTRACT.

CONTEMPT.

See ARBITRATION, 4.

CONTINGENT DAMAGES.

See ARBITRATION, 1.

CONTRACT.

Construction—Words "Net Cash."] The defendant, a coal factor, sold coals for the plaintiff upon the following authority: "Please sell for me 250 tons of coal at such a price as will realize me not less than 15s. per ton, net cash, less your commission":—

Held, not to support a declaration for breach of contract in not selling for ready money. The meaning of such a contract is, "Sell for me, so as to have ready money forthcoming to me on the day of sale to the amount of 15s. per ton." *Boden v. French*, 363.

See PLEADING. CORPORATION, 1.

COPYRIGHT.

1. *Right of a Foreigner to, in this Country.*] A foreign author residing abroad, who composes a work abroad, and sends it to this country, where it is first published under his authority, acquires a copyright therein; and a British subject, to whom such work is assigned by the foreign author, also gains such right. *Boosey v. Jefferys*, 479.

Boosey v. Purday, 4 Exch. 145, overruled. *Ib.*

2. *Assignment.*] An assignment of copyright, if valid according to the law of the country where it is made, is valid here. *Ib.*

3. *Infringement.*] B. composed an opera in Milan, and assigned it there, according to the law of Milan, to one R., who assigned it in England, according to the English law, to the plaintiff, who published it in this country before any publication abroad:—

Held, that the plaintiff might maintain an action for the infringement of the copyright of such work. *Ib.*

4. *Shape and Configuration—Combination of Parts.*] A design was registered for a new ventilator, consisting of an oblong pane of glass fixed in a frame, which was inserted into an ordinary window frame, and was hinged at the top so as to open and admit the air by means of a screw acted upon by cords passing over its head, and having a half pane of glass fixed in the lower portion of the frame in which

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the ventilating frame moved, so as to prevent a downward draught. The claim of the inventor was stated to be for the general configuration and combination of the parts, none of which, if taken *per se*, and apart from the purposes thereof, were new or original:—

Held, that this was not a design for the shape and configuration of an article of manufacture within the 6 & 7 Vict. c. 65, and therefore not the subject of registration. *Regina v. Besell*, 311.

5. *Conviction.*] A conviction for the infringement of such a registered design was quashed for want of jurisdiction. *Ib.*

CORPORATION.

1. *Implied Contract.*] A public company incorporated under act of Parliament cannot generally contract, except in the mode and upon the conditions specified either in the special act or the general act to which it is subject, such as the Companies Clauses Act, 8 & 9 Vict. c. 16. *Homersham v. Wolverhampton Waterworks Co.*, 426.

The plaintiff, an engineer, entered into a contract under seal with the Wolverhampton Waterworks Company for the supply of machinery and the execution of works for the purposes of the company, with certain provisions as to extra work. The company was incorporated subject to the general provisions of the 8 & 9 Vict. c. 16; but by the special act, three directors were made a quorum. Much extra work was done by the plaintiff, with the sanction of the engineer of the company, but not according to the provisions of the contract; and after the work was done, and a claim made by him for payment of the price stipulated in the contract, together with a further sum for the extra work, a sum of 1000*l.* was paid to him on the general account; but no proof was given that this payment was made by the order of three directors:—

2. *Held*, in an action brought to recover for the extra work, that there was no evidence to go to the jury of any contract with the company. *Ib.*
3. *Quære*, whether upon proof that such payment had been made by order of three directors, any contract binding on the company would have been implied. *Ib.*
4. *Liability of a Member for Debts of Company.*]

See BANKRUPTCY, 7, 8.

5. *Member of—Liable to an Action.*]

See FOREIGN LAW, 3.

COMPOSITION.

Of Rates—Criterion for.]

See TAXES, 2.

COSTS.

1. *London Small Debts Act*, 10 & 11 Vict. c. 71 — *Suggestion.*] *Quære*, whether the 13 & 14 Vict. c. 61, affects the London Small Debts Act, 10 & 11 Vict. c. 71; and consequently whether, in order to deprive a plaintiff of costs under the provisions of this latter statute, a suggestion for that purpose must be entered on the roll by the defendant. *Hewitt v. Paterson*, 519.
2. *Replevin against Justices—Costs as between Attorney and Client.*] The 5 & 6 Will. 4, c. 76, which enacts, that in all actions against any person for any thing done in pursuance of the act, if judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, does not apply to actions of replevin brought against magistrates to try the validity of a distress for borough rates. *Jones v. Johnson*, 424.
3. *Certificate for*, under 9 & 10 Vict. c. 95.] Under the 9 & 10 Vict. c. 95, s. 129, (the County Court Act,) a judge of a superior court may certify for costs at any time before the costs are taxed. *Tharrell v. Trevor*, 407.
4. *Where Title to Real Estate is in Question.*] Where a plaintiff recovers in a superior court a less sum than those mentioned in the 13 & 14 Vict. c. 61, s. 11, in any of the actions there specified, the *onus* of proving that he is entitled to costs under

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sect. 13 of the same act is cast upon him; and if he claims his costs upon the ground that title was in question, under the 9 & 10 Vict. c. 95, s. 58, he is bound to establish the fact that the title did really *bona fide* come in issue, and not merely that the defendant so pleaded that it might possibly have come in issue. *Latham v. Spedding*, 273.

5. *Of feigned Issue under Enclosure Act.*] Where the court have granted an application for a feigned issue, under the statute 8 & 9 Vict. c. 118, s. 44, to try whether a certain close be part of a particular manor, and the applicant, the plaintiff in the feigned issue, fails on the trial, the court will order him to pay the costs of it to the defendant in the feigned issue. *Regina v. Kelsey*, 251.

6. *Party liable for Costs of Taxation.*] A judge's order, referring an attorney's bill to taxation, reserved to the client the right of disputing his liability to the whole or any part of it, on certain specified grounds. The order did not contain any direction to the master to tax the costs of the reference, as required by the stat. 6 & 7 Vict. c. 73, s. 37. The master taxed off less than a sixth of the whole bill, and taxed the attorney the costs of the reference:—

Held, that the client was liable to pay the costs of the taxation, whatever might be the event of the questions reserved. In re *George Shaw*, 247.

7. *Taxation of.*] Debt for work and labor. Pleas, first, except as to 10*l.* parcel, &c., never indebted; secondly, as to 10*l.* other parcel, &c., payment; thirdly, as to the 10*l.* above excepted, payment into court of 10*l.* 1*s.* in full satisfaction of the said sum of 10*l.* and damages by reason of its non-payment. Replications, joining issue on the first plea; traversing the payment alleged in the second plea; and to the third plea, that the plaintiff accepted and took out of court the amount paid in, in satisfaction of the causes of action in that plea alleged, and prayed judgment for his costs in that respect. A verdict was found for the plaintiff on the plea of never indebted, for 10*l.* beyond the sum paid into court, and for the defendant on the second plea:—

Held, that the plaintiff was entitled, under Reg. Gen. Trin. term, 1 Vict., to have allowed him, on taxation, all his costs of suit in respect of the cause of action to which the plea of payment into court had been pleaded, including the costs of the replication to that plea. *Rumbelow v. Whalley*, 231.

8. *How charged by Attorney.*]

See ATTORNEY, 1.

9. *What is a Delivery of a Bill of Costs.*]

See ATTORNEY, 2.

10. *In County Court.*]

See COUNTY COURT, 1.

11. *Of contesting Election.*]

See ELECTION, 2. ARBITRATION, 2, 3, 8, 9. AFFIDAVIT.

COUNCILLORS.

See ELECTION, 1.

COUNTING HOUSE.

What is, within 7 & 8 Geo. 4, c. 29.]

See LARCENY, 2.

COUNTY COURT.

1. *Jurisdiction of—Suit in Superior Courts.*] An action was brought by a second indorsee of a bill of exchange against the drawer. It was shown that the bill of exchange was drawn and indorsed, and notice of dishonor given, within the jurisdiction of the county court within which the defendant dwelt. On motion to enter a suggestion to deprive the plaintiff of his costs under sect. 128 of the County Court Act:—

Held, that the cause of action arose in some material point within the jurisdiction of the county court:—

Held, also, that if a bill of exchange is drawn and indorsed within the jurisdiction of the county court, an indorsee is not at liberty to sue in the superior courts, by

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- reason of his not knowing where the bill was drawn and indorsed. *Husk v. Long*, 199.
2. *Jurisdiction — Prohibition* — 9 & 10 Vict. c. 95, s. 58 — *Malicious Prosecution*.] A summons issued from the County Court of S. in the following terms: "For that your wife assaulted the wife of the plaintiff on, &c., and maliciously caused the plaintiff to be wrongfully charged with stealing, &c., and to be detained in custody, &c., whereby the plaintiff was put to expenses in producing witnesses and other persons in clearing the plaintiff's said wife from the said malicious assault and charge," &c.; particulars were annexed in terms similar to the summons, claiming for damages a sum of 10*l.*: —
Held, that this was an action for a malicious prosecution, and that by the 9 & 10 Vict. c. 95, s. 58, the county court had no jurisdiction. *Jones v. Curry*, 325.
3. *Jurisdiction of*.] Where to an action of trespass *quare clausum fregit* the defendant pleaded "not possessed," but no question of title came in question: —
Held, that the jurisdiction of the county court was not ousted. *Latham v. Spedding*, 273.
4. *Writ of Trial — Court of Record*.] A writ of trial, under the 3 & 4 Will. 4, c. 42, cannot be directed to a judge of a county court established under the 9 & 10 Vict. c. 95. *Owens v. Breese*, 536.

COUNTY COURT ACT.

See AFFIDAVIT.

COVENANT.

1. *Construction of*.] The declaration stated that the defendants were provisional directors of a certain company and promoters of a bill in Parliament for making a railway from E. to P., and that by articles of agreement between them and the plaintiff it was witnessed, that in consideration of the covenants thereafter contained, the plaintiff covenanted that he would accede to the bill, and the defendants covenanted that, in the event of the bill passing into a law, the company should pay him for so much of his land as should be intersected by the railway at the rate of 120*l.* per acre, and secondly, that they should pay him 3000*l.* in full compensation for the general damage which the railway might do to the mansion, park, and estate, including the crossing of the road near the park entrance, the lowering the road, the obstruction of views, disturbance of privacy of the park, &c., the expense of temporary residence during the progress of the works, the depreciation as a residence, the additional expense in the cultivation of the farms by the alteration of the road, and all other damage to be done to the mansion and park. Averment, that the plaintiff did assent to the bill, and the same passed into a law; that the company entered on the plaintiff's lands and cut down trees, &c., and although seven acres were intersected and severed by the railway, and the park and mansion deteriorated, yet neither the company nor the defendants had paid the plaintiff 120*l.* per acre, nor the 3000*l.* Fourth plea, that the company did not enter on the plaintiff's land. Fifth, that the quantity of the plaintiff's land intersected by the railway was not required by the company for the purposes of the railway, nor was it severed from the remainder of the fields: —
Held, per Parke and Platt, BB., that the defendants were bound by their covenant to pay the plaintiff the sum of 3000*l.* immediately after the passing of the act, although the railway had not been constructed nor any damage done to the plaintiff's land; *dissentiente* Pollock, C. B., who held that the plaintiff was not entitled to the 3000*l.* until his land should have been taken or some damage done. *Bland v. Crowley*, 441.

2. *When dependent*.]

See APPRENTICE, 1. LANDLORD AND TENANT.

CROSS EXAMINATION.

See WITNESS, 2.

CUSTOM ACTS.

See SMUGGLING.

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DAMAGES.

1. *For Land taken by Railway.*]

See LANDS CLAUSES CONSOLIDATION ACT, 2, 4.

2. *Contingent Assessment.*]

See NEW TRIAL, 3.

DECEIT.

See PLEADING, 1.

DECLARATION.

Sufficiency of.]

See PLEADING, 1.

DELIVERY.

Of a Bill of Costs.]

See ATTORNEY, 2.

DEMAND.

See ARBITRATION, 4.

DEMURRER.

See OVERSEER, 1, 2. PLEADING, 2.

DEPOSITION.

Of absent Witness.]

See EVIDENCE, 7. WITNESS, 3.

DEPOSIT OF GOODS.

See TROVER, 2.

DEVIATION.

Meaning of, in 8 Vict. c. 20, s. 15.]

See LANDS CLAUSES CONSOLIDATION ACT, 3.

DIRECTORS.

Power of, to bind Corporation.]

See CORPORATION, 1.

DISTRESS.

For Borough Rates.]

See COSTS, 2. LANDLORD AND TENANT. TRESPASS.

DISTRINGAS.

Without previous Calls.] The defendant had no known residence, and could not be found, but he called occasionally at his solicitors' for letters and answered such letters, posting them in London. The plaintiff's solicitor wrote to the defendant, enclosing a copy of the writ of summons, directed to the defendant at his solicitors', and a correspondence afterwards passed between the plaintiff's attorney and the defendant respecting a compromise of the plaintiff's claim.

The court granted a *distringas* to compel an appearance, though there had not been the usual calls and appointments. *Gorringe v. Terrewest*, 187.

EASEMENT.

1. *Rights to flowing Water, Air, and Light.*] Flowing water, air, and light are bestowed by Providence for the common benefit of men; and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. *Embrey v. Owen*, 466.

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2. *Irrigation of Land.*] A riparian proprietor has a right to irrigate his land by water from the stream, provided he does not thereby interfere with the rights of the other riparian proprietors; and whether the use made by him of the stream for this purpose be reasonable and permitted, or not, depends on the circumstances of each case. *Ib.*
3. *Reasonable Use of Water.*] Where an action on the case, founded on such an irrigation, was brought against a riparian proprietor by another having a mill lower down on the stream, it appearing that the irrigation did not take place continuously, but only at intermittent periods, when the river was full, and that no damage was done thereby to the working of the mill, and that the diminution of water was not perceptible to the eye: —
Held, that this was a reasonable use of the water by the defendant, for which no action could be maintained. *Ib.*
4. *Appreciable Quantities — Practice.*] In that action the defendant pleaded, first, the general issue; and, secondly, that J. J. was possessed of four closes on the bank of the stream above and of the bed of it up to the middle, that the water immemorially flowed over that part of the bed, and that at certain periods of the year, viz., in January, February, and March, when the water was more than sufficient for the use of the mill, the defendant, as the servant of J. J., diverted small and reasonable quantities of the water for the irrigation of those closes, which, excepting such small quantities as were absorbed and used in the irrigation, were returned into the stream above the mill, &c. The plea then averred that the diversion was not continuous, but only intermittent, and that the quantities of water absorbed and lost were very small and unappreciable, and that the diversion caused no damage or impediment to the plaintiff's mill. To this plea the plaintiff replied *de injuria*. At the trial the judge, in directing the jury on this plea, told them that he felt great difficulty in affixing a legal meaning to the term "unappreciable," but suggested that it might mean "so inconsiderable as to be incapable of value or price:" and the defendant obtained a verdict generally. The court inclined to think this interpretation of the word "unappreciable" erroneous, but considering the defendant entitled to succeed on the general issue, refused to set aside the verdict if he would consent to its being entered for the plaintiff on the special plea. *Ib.*

EJECTMENT.

1. *When not maintainable.*] Where a railway company have complied with the provisions of sect. 85 of 8 Vict. c. 18, and have entered upon and taken land within the prescribed period for exercising their compulsory powers, their continuance in possession after the prescribed period, without having the compensation assessed and the land conveyed to them, is not unlawful, and an ejectment cannot be maintained against them under such circumstances. *Doe d. Armistead v. North Staffordshire R. Co.*, 216. *Worsley v. South Devon Railway Co.*, 223.
2. *Against Canal Company — Statute, Construction of.*] Ejectment to recover a portion of the land and banks of the Swansea Canal. In 1779, P., being seized of the above-mentioned land, demised the same to M. & Co. for sixty-five years. In 1793, the Swansea Canal Company was formed for making a canal, which was intended to pass, amongst other places, in part through the land in question, and they obtained an act for that purpose. In 1797, M. & Co. and the Duke of B. widened a canal made by M. & Co., and extended the same through part of the above land, which canal joined and formed a continuation of the Swansea Canal. The powers for making a portion of the canal which passes through a portion of the lands sought to be recovered were obtained by the Duke of B. and M. & Co. By that act it was enacted, sect. 47, that upon payment or tender of certain sums of money, adjudged by certain commissioners or assessed by juries, for the purchase of any such lands, &c., it should be lawful for the canal company to enter upon such lands, or before such payment or tender by leave of the owners and occupiers, and thereupon such lands shall be vested in such company. The lands sought to be recovered in this action formed part of the lands authorized to be taken by the canal act. No payment or satisfaction was made or agreed to be made to the owners of the lands, but every thing was done by the Duke of B. with the full consent and approbation, and in accordance with the wishes, of such owners and proprietors. The defendant, in 1835, became the assignee of the said Duke of B.

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One J. C., in 1800, became the purchaser of the said lands, and the interest therein afterwards became vested in the lessors of the plaintiff at the expiration of the lease in 1845:—

Held that the lessors of the plaintiff were entitled to recover possession of the lands. *Doe d. Patrick v. Beaufort*, 496.

ELECTION.

1. *Validity of.*] At a meeting of the town council a minority of the councillors present delivered voting papers to the mayor, for certain persons to be elected aldermen. The mayor and the majority of the town councillors had been advised that the day was not the proper one for the election. The mayor consequently declined to proceed with the election, and no election was declared. It was, in fact, the duty of the council to have proceeded to the election of aldermen on that day, had they known the law:—

Held, that the act of the minority was not the act of the town council; that the election had not been part held, but that there had been no election; and that, consequently, a *mandamus* might issue calling upon the council to proceed to elect aldermen. *Regina v. Mayor of Bradford*, 194.

2. *Candidate liable for Costs of contesting.*] S. and H. were rival candidates for the office of town councillor of a borough. An objection was taken at the election to the validity of certain votes in S.'s favor, which turned the election. The mayor overruled the objection, and S. took his seat. The rival candidate obtained a rule *nisi* for an information in the nature of a *quo warranto* against S. The latter thereupon declined to show cause, and expressed a willingness to resign his seat:—

Held, that S. was liable to the costs of the information, as he had been a candidate for the office. *Regina v. Sidney*, 234.

ENTRY.

When not unlawful.] Where the promoters of a railway company have entered upon and taken land under the provisions of sect. 85 of the Lands Clauses Consolidation Act, within the period prescribed for exercising their compulsory powers, their continuance in possession after that period, without making compensation to the owner of the land, does not render their original entry unlawful. *Worsley v. South Devon Railway Co.*, 223.

See EJECTMENT, 2.

ERASURE.

In Deeds, Effect of.]

See ALTERATION OF INSTRUMENTS.

ERROR.

See SLANDER. NEW TRIAL.

ESTOPPEL.

Deed—Trover.] The plaintiff and the defendant had been in partnership together as paper makers and iron merchants, and in the deed of dissolution it was recited that an agreement had been made that the defendant should have all the stock in trade in the business of paper makers, but the plaintiff should receive paper out of that stock to the value of 898*l.* 4*s.* 11*d.*, which was to remain in the paper mill for a year, and that the plaintiff was to have all the stock in trade in the iron business. The deed also recited, that in pursuance of that arrangement paper of that value had been delivered to the plaintiff, and the same then was in the paper mill as the plaintiff acknowledged; and then followed an assignment by the defendant to the plaintiff of all the stock in trade in the iron business, and by the plaintiff to the defendant of all the stock in trade in the paper-making business, "except the 898*l.* 4*s.* 11*d.* worth of paper so delivered to the plaintiff as aforesaid." No actual delivery or separation of this portion of the paper took place; but there was evidence of a conversion of the whole by the defendant:—

Held, that the defendant was estopped from saying that there was no delivery to the plaintiff: and that there having been a conversion of the whole, the deed showed

that the plaintiff had sufficient possession to support an action of trover. *Wiles v. Woodward*, 510.

EVIDENCE.

1. *Pleading — Onus Probandi.*] In an action by the indorsee against the acceptor of a bill of exchange, to which the defendant pleads that the bill was obtained from him by fraud, and was indorsed to the plaintiff without consideration, to which the plaintiff replies *de injuria*, although the plea would not be good without this latter averment, proof of the former turns on the plaintiff the *onus* of proving that he gave consideration for the bill. *Harvey v. Towers*, 531.
2. *Bill of Exchange — Fraud — Consideration.*] Under such circumstances the judge determines whether there is evidence of fraud to go to the jury, and gives them a contingent direction, that if they think the fraud proved, the plaintiff is bound to satisfy them that he gave consideration for the bill. *Id.*
3. Per Alderson, B. The *onus probandi* does not always lie on the party who asserts the affirmation of the issue; for when a negative averment is necessary to make a pleading good, the *onus* of proving that averment lies on the party who makes it. *Id.*
4. *Certainty.*] When a contract is alleged in pleading to have been for a "certain" time or amount, it is sufficient to prove that some specific time or amount was agreed upon, and it is not necessary to prove the precise time or amount laid under a *videlicet*. *Harris v. Phillips*, 344.
5. *Time and Amount — Videlicet — Hire.*] The declaration stated that the plaintiff promised to hire horses from the defendant, and employ them for a certain space of time, to wit, for the space of one year, and to pay the plaintiff for the use thereof certain hire and reward, to wit, 50*l.* a year for each of the horses, payable quarterly:—
Held, that the allegations after the *videlicets* were immaterial; that although it was proved that the hiring was for a week, and from week to week, at the hire of 50*l.* a year for each horse, payable weekly, there was no fatal variance; that the words "hire and reward" include time as well as amount, and therefore that the words "payable quarterly" were covered by the *videlicet* as well as the sum. *Id.*
6. *Variance — Persons unknown.*] An indictment charged A, B, and C, with conspiring together and "with divers other persons, to the jurors unknown." The evidence at the trial applied only to A, B, and C. The jury found that A had conspired with either B or C, but that they could not say with which. The judge directed a verdict of guilty to be entered against A, and of not guilty in favor of B and C:—
Held, (Erle, J., *dissentiente*), that on this finding A was entitled to be acquitted, as the words "persons unknown" meant persons other than A, B, and C, and that there was no evidence adduced as to any other persons being concerned. *Regina v. Thompson*, 287.
7. *Deposition of absent Witness — When admissible.*] The deposition of a witness taken before a justice in pursuance of sect. 17 of stat. 11 & 12 Vict. c. 42, is not admissible in evidence against a prisoner, upon proof that he is kept out of the way by means or procurement of some other person than the prisoner.
Therefore, where, upon the trial of an indictment against two prisoners for a larceny, it appeared that a witness was kept out of the way by the contrivance of one of the prisoners only:—
Held, that the deposition, though admissible in evidence, should be applied only to the case against him. *Regina v. Scaife*, 323.
8. *Proof of Receipt of stolen Goods from other Sources.*] On an indictment for feloniously receiving goods knowing them to have been stolen, it is not competent for the prosecutor, in proof of guilty knowledge of the prisoner, to give in evidence that the prisoner, at a time previous to the receipt of the prosecutor's goods, had in his possession other goods of the same sort as those mentioned in the indictment, but belonging to a different owner, and that those goods had been stolen from such owner. *Regina v. Oddy*, 572.
9. *When an altered Deed may be.*

See ALTERATION OF INSTRUMENTS. GUARANTY.

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EXECUTION.

1. 7 & 8 Vict. c. 110, s. 66 and 68 — *Jurisdiction of Judge.*] Where an application under the 7 & 8 Vict. c. 110, s. 66 and 68, for execution against a shareholder in a joint-stock company on a judgment obtained against the company is refused, no fresh application can be made without a fresh notice; and this even though the first application were made to a judge who had no jurisdiction. *Edwards v. Cameron's Railway Co.*, 529.
2. *Quere*, whether, notwithstanding the 1 & 2 Vict. c. 45, s. 1, such applications can be made to a judge who is not a judge of the court in which the judgment has been obtained. *Ib.*
3. *Corder v. The Universal Gas Light Company*, 6 Com. B. 199, affirmed. *Ib.*
See TROVER, 2.

EXPRESS PROMISE.

- By what Consideration supported.*] See PLEADING, 1.

EXTRA WORK.

See CORPORATION.

FEIGNED ISSUE.

- Costs of.*] See COSTS, 5.

FIAT.

- In Bankruptcy, when valid.*] See BANKRUPTCY, 8.

FLOWAGE.

1. *Action for.*] A railway was constructed across certain low lands adjoining the River D., over which the flood waters of that river used to spread themselves. These low lands were separated from the plaintiff's lands by a bank, constructed under certain drainage acts, which protected the plaintiff's lands from floods. By the construction of the railway without sufficient openings the flood waters could not spread themselves as formerly, but were penned up and flowed over the bank upon the plaintiff's lands. There was no express clause in their act obliging the railway company to make openings for flood waters in that district, but there was a general provision that they should make openings when the railway crossed any public drains, embankments, or works in any drainage district: —
Held, that although they might not be compellable by *mandamus* to make openings for the flood waters in that district, yet that an action would lie against the company for the injury to the plaintiff's lands. *Laurence v. Great Northern Railway Co.*, 265.
2. *Right to use Water.*] Where an action on the case, founded on an irrigation, was brought against a riparian proprietor by another having a mill lower down on the stream, it appearing that the irrigation did not take place continuously, but only at intermittent periods, when the river was full, and that no damage was done thereby to the working of the mill, and that the diminution of the water was not perceptible to the eye: —
Held, that this was a reasonable use of the water by the defendant, for which no action could be maintained. *Embrey v. Owen*, 466.

FLOWING WATER.

- Right in.*] See EASEMENT, 1, 2.

FORBEARANCE.

See USURY.

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FOREIGN JUDGMENT.

1. *Conclusiveness of.*] A foreign judgment is examinable, and is only *prima facie* evidence of debt here, so far as to show that the foreign court had not jurisdiction of the subject matter of the suit, or that the defendant was never served with process, or that the judgment was fraudulently obtained; but is conclusive upon the defendant so far as to prevent him from alleging that the promises upon which it is founded were never made or were obtained by fraud of the plaintiff. *Bank of Australasia v. Nias*, 252.
2. *Pleas in an Action on.*] Any pleas which might have been pleaded to the original action cannot be pleaded to the action upon the judgment. *Ib.*
3. *When a Bar.*] The defendant, being sued as a member of the company upon a contract entered into by the company, pleaded the judgment recovered against the chairman in the colony of New South Wales.
Held, that the plea was bad. *Ib.*

FOREIGN LAWS.

1. *Validity of.*] An act of the colonial legislature of New South Wales enabled the chairman of a company to sue and be sued on behalf of the company, and provided that execution upon any judgment in such an action against the chairman might be issued against the goods, lands, &c., of any member of the company, in like manner as if such judgment had been obtained against him personally:—
Held, first, that the colonial legislature had authority to make such an act, and that it contained nothing repugnant to the law of England or to natural justice. *Bank of Australasia v. Nias*, 252.
2. *Extra territorial Validity.*] *Secondly*, that the specific mode provided for enforcing the judgment by execution against a member of the company could not be obtained against a shareholder out of the colony. *Ib.* But,—
3. *Action upon Judgment.*] *Thirdly*, that the judgment against the chairman might be made the foundation of an action against a member beyond the territory of the colony, in the same manner as if he had been personally served and the recovery had been against him as a party to the record. *Ib.*

FORGERY.

See BILL OF EXCHANGE, 1, 2.

FRAUD.

See PROMISSORY NOTE, 1, 2.

FUNERAL.

Wife's Funeral, Husband liable for.]

See HUSBAND AND WIFE, 2.

GILBERT'S ACT, 22 Geo. 3.

See PAUPER, 1.

GOODS SOLD AND DELIVERED.

See WARRANTY. PLEADING.

GRAND JURY.

See PRACTICE, 9.

GRATUITOUS PAYMENTS.

See HUSBAND AND WIFE, 2.

GUARANTY.

1. *Construction — Several Documents.*] Plaintiffs wrote to defendant, "We are doing business with B., and require a guaranty to the amount of 200*l.*, and they refer us to you." Defendant wrote in answer, "I have no objection to become security for

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- B, and subjoin a memorandum to that effect." The memorandum subjoined was, "I hereby engage to guaranty to Messrs. Colbourn, iron masters, 200*l.* for iron received from them for B as annexed:"—
- Held*, that these three documents were to be read together, and that the words "we are doing business," taken with the rest, showed that the consideration for the defendant's undertaking was that the plaintiffs should continue to supply B with goods; and that there was therefore a good consideration. *Colbourn v. Dawson*, 378.
2. Per *Jervis*, C. J. If the last document alone had constituted the contract, parol evidence would have been admissible to construe the words "for iron received." *Ib.*
3. *Past or future Consideration.*] The declaration alleged, that in consideration that the plaintiffs, at the request of the defendant, would deliver certain iron to B. on credit, the defendant promised to guaranty to the plaintiffs the price of the said iron to the amount of 200*l.*:—
- Held*, that there was no variance that the promise was to be looked at apart from the consideration; that assuming the guaranty to contain a promise to guaranty to the plaintiffs the price of iron supplied, it also contained a promise to guaranty the price of iron to be supplied, and that the plaintiff was not bound to state the whole of the promise, but only the part for the breach of which he sued. *Ib.*

HUSBAND AND WIFE.

1. *Wife's Necessaries.*] The wife of a lunatic, even though confined in an asylum as dangerous, may pledge his credit for necessities for herself; and the persons who have supplied her with such may sue the husband in an action of debt. *Read v. Legard*, 523.
2. *Wife's Funeral — Undertaker employed by Volunteer — Liability of Husband.*] When a wife dies, [although living separate from her husband,] her husband is bound to provide her with a funeral at a reasonable expense; and if he does not do so, any person who voluntarily employs an undertaker and pays him for performing such a funeral, is entitled to recover the sum so expended from the husband, in an action for money paid. *Ambrose v. Kerrison*, 361.

IDEM SONANS.

See *JURY*, 2.

ILLEGITIMATE CHILDREN.

See *BASTARDY*.

IMMATERIAL ALTERATION.

See *ALTERATION OF INSTRUMENTS*.

INDENTURES.

See *APPRENTICE*, 1, 3.

INDICTMENT.

1. *For Conspiracy.*] An indictment charged A, B, and C with conspiring together and "with divers other persons, to the jurors unknown." The evidence at the trial applied only to A, B, and C. The jury found that A had conspired with either B or C, but that they could not say with which. The judge directed a verdict of guilty to be entered against A, and of not guilty in favor of B and C:—
- Held*, (*Erle*, J., *dissentiente*.) that on this finding A was entitled to be acquitted, as the words "persons unknown" meant persons other than A, B, and C, and that there was no evidence adduced as to any other persons being concerned. *Regina v. Thompson*, 287.
2. *For Conspiracy — When barred.*] The 3 & 4 Will. c. 53, s. 120, enacts, that all suits, indictments, or informations exhibited for any offence against that or any other act relating to the custom in any of his majesty's courts of record at Westminster, shall be brought within three years after the date of the commission of the offence:—

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Held, that this was confined to indictments to be brought under sects. 75 and 112, in the name of the attorney general, in one of the courts of record at Westminster, and did not apply to an indictment preferred at the assizes for a conspiracy to defraud the queen of certain duties, which was an offence at common law. *Id.*

3. *Night poaching.*] If persons to the number of three or more are together in one party armed, by night, in any land for the purpose of destroying game there, and the land consists of several closes, and one of such persons be in one close and another in a different close of the land, they may be convicted under the stat. 9 Geo. 4, c. 69, s. 9. The conviction will not be affected by the circumstance that one of the closes is an enclosed field and another an open waste, and that each is in the occupation of different tenants. *Regina v. Uzzell*, 568.

4. *Materiality of Averment in.*]

See PERJURY, 1.

INDORSEMENT.

See BILL OF EXCHANGE, 1.

INFANCY.

See NONSUIT.

INFORMALITY.

In Warrant for Distress.]

See TRESPASS, 2.

INFORMATION.

See ELECTION, 2.

INFRINGEMENT.

Of Patents.]

See PATENT, 2.

INJURY TO LAND.

Action for.]

See FLOWAGE, 1, 2.

INSOLVENCY.

Assignee's liability to Messenger.] A creditor's assignee in insolvency under 5 & 6 Vict. c. 116, s. 1, and 7 & 8 Vict. c. 96, s. 4, is not liable for the messenger's fees, except upon an express contract. *Hamber v. Hall*, 382.

INSTALMENTS.

See CALLS, 2.

INSURANCE.

1. *Corn free from Average — Total Loss.*] Where corn is insured free from average, and, in consequence of injury sustained by the ship, is damaged in the voyage and taken out at an intermediate port during the repairs of the ship, there is not a total loss, unless the corn is in such a condition that the expense of bringing it to the port of destination for sale would exceed the value of it when brought; and it is not a proper question to leave to the jury, whether the insured had acted as a prudent uninsured owner would have acted under the circumstances. *Reimer v. Ringrove*, 388.

2. *Perils of the Sea — Damage, direct and consequential.*] A ship loaded with hides and tobacco whilst on her voyage encountered bad weather and shipped much sea water, whereby the hides were wetted and rendered putrid. Neither the tobacco nor the packages containing it were immediately in contact with nor directly damaged by sea water; but the tobacco was damaged and deteriorated in flavor by the fetid odor proceeding from the putrid hides: —

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Held, that this was a loss by peril of the sea. *Montoya v. London Assurance Co.*, 500.

See USURY.

IRRIGATION.

See EASEMENT, 1, 2, 3.

ISLE OF MAN.

See BANKRUPTCY, 9.

JOINT CONTRACT.

See ACTION, 2.

JOINT OFFENDERS.

See CONSPIRACY.

JOINT-STOCK COMPANY.

See CALLS, 3.

JUDGMENT.

1. *Action upon.*]

See FOREIGN JUDGMENT.

2. *Arrest of.*]

See PLEADING, 1.

JUDICIAL NOTICE.

See PAUPER, 8.

JURISDICTION.

1. *Of Queen's Bench in Cases of Bankruptcy.*]

See BANKRUPTCY, 2.

2. *Of County Court.*]

See COUNTY COURT, 1.

3. *Of County Court in Trespass quare clausum.*]

See COUNTY COURT, 5.

JURY.

1. *Proper Question for.*] Where corn is insured free from average, and, in consequence of injury sustained by the ship, is damaged in the voyage and taken out at an intermediate port during the repairs of the ship, there is not a total loss, unless the corn is in such a condition that the expense of bringing it to the port of destination for sale would exceed the value of it when brought; and it is not a proper question to leave to the jury, whether the insured had acted as a prudent uninsured owner would have acted under the circumstances. *Reimer v. Ringrove*, 388.

2. *Indictment — Name of Prosecutor — Rule Idem sonans.*] Where an indictment for larceny described the prosecutor as Darius C., and the prosecutor in evidence stated that his name was Trius C.:—

Held, that it was a question of fact for the jury, and not of law for the court, whether the two words were *idem sonantia*. *Regina v. Davis*, 564.

3. *Mistake in Impanelling.*]

See NEW TRIAL, 1. LANDS CLAUSES CONSOLIDATION ACT, 1.

JUSTICES.

1. *Jurisdiction of Justices — Praying Sureties of the Peace — Conviction of Assault.*] An information made before a magistrate stated that the informant, having been assaulted and beaten by another person, prayed that he might be bound over to keep the peace towards him. On the magistrates', before whom the case was

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heard, proceeding to deal with the merits of the question of the assault, the informant protested against their adjudicating upon it:—

Held, that the justices had no jurisdiction to convict summarily the offending party of the assault against the will of the informant, as under the stat. 9 Geo. 4, c. 31, s. 27, the justices have no jurisdiction to convict of an assault, unless the party aggrieved complain of that assault before them, with a view to their adjudicating upon it. *Regina v. Deny*, 206.

2. *Liability for exceeding Jurisdiction.*]

See TRESPASS, 2.

LANDS CLAUSES CONSOLIDATION ACT.

1. *Warrant for a Jury.*] Under sect. 39 of the Lands Clauses Consolidation Act, the promoters of a railway company may properly issue their warrant to summon a compensation jury to the sheriff of the county where the lands are situated, although the under sheriff be interested as a shareholder in the company. *Worsley v. South Devon Railway Co.*, 223.

In such a case, the sheriff should either take the inquisition in person or appoint some disinterested deputy. *Ib.*

2. A was the owner of a field, the whole of which was contained in the books of reference of a railway company, but fifteen perches of it lay beyond the limits of deviation laid down in the plans. The company served a notice upon A, requiring part of the field for the purpose of the railway. A then gave notice to the company that if they took part they must take the whole, to which they agreed. A afterwards receded from his notice. The company then entered upon the whole under sect. 85 of the Lands Clauses Consolidation Act:—

Held, that the question, whether the fifteen perches were necessary for the works, was for the jury, and also that A, having required the company to take the whole, could not object that their entry on that portion was unlawful. *Doct. d. Armistead v. North Staffordshire R. Co.*, 216.

3. The expression "deviation," in 8 Vict. c. 20, s. 15, is used with reference to the *medium filam* of the railway as laid down in the parliamentary plans. *Ib.*

4. *Compulsory Power.*] The ascertaining the amount of compensation after lands have been entered upon and taken under sect. 85 of the Lands Clauses Consolidation Act, is no exercise of a compulsory power on the part of the company. *Ib.*

5. *Construction.*] Sect. 68 applies to the case of lands entered upon and used under sect. 85, and the land owner is in such case bound to initiate proceedings for settling the compensation. *Ib.*

LANDLORD AND TENANT.

Distress Covenant to consume Hay on Premises.] A landlord who has distrained his tenant's hay made on the premises, and has sold it subject to a condition that it shall be consumed by the purchaser on the premises, by reason whereof it produces less than the usual price, is liable to the tenant in an action for not selling for the best price, notwithstanding that the latter was under covenant to consume such hay on the premises. *Ridgway v. Stafford*, 453.

Abbey v. Petch, 8 M. & W. 419, disapproved.

LARCENY.

1. *Determination of Bailment by tortious Act of Bailee.*] The prisoner was employed by the prosecutor to sell clothes on commission. The prosecutor fixed the price of each article, and the prisoner was intrusted with the articles to sell at that fixed price, and he was to bring back the money or the goods if they remained unsold. The prisoner on one occasion took away a parcel of clothes on these terms, but instead of selling them he fraudulently pawned part and fraudulently applied the residue of them to his own use:—

Held, that there was but one bailment of all the separate articles forming the parcel; that the original bailment was determined by the unlawful act of pawning part of them; and that, consequently, the subsequent fraudulent appropriation of the residue amounted to a larceny. *Regina v. Poyser*, 565.

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2. *Stealing from a Counting-house — What a Counting-house.*] The prisoner was indicted for stealing money from a counting-house. The proof was that he stole money from a building called "the machine-house," on the premises of a person who had large chemical works. All goods sent out were weighed in this building, and in it the men's time was taken and wages paid. The books in which the men's time was entered were brought to the building for the purpose of making the entries, but were kept in another building on the premises called "the office," where the general books and accounts of the concern were kept:—
Held, that there was evidence that the building was a counting-house within the act 7 & 8 Geo. 4, c. 29, s. 15. *Regina v. Potter*, 575.

LAW AND FACT.

See JURY, 2.

LIMITATIONS, STATUTE OF.

1. *Acknowledgment of Payment.*] An acknowledgment of payment, in writing, although unsigned, is sufficient to take a debt out of the Statute of Limitations. *Cleave v. Jones*, 514.
 2. *Semble*, a verbal acknowledgment would also be sufficient. *Ib.*
 3. To a declaration on a promissory note for 350*l.*, with interest, the defendant pleaded the Statute of Limitations. At the trial, the only evidence given by the plaintiff in support of this issue was the following unsigned entry in a book of the defendant, and in her hand writing: "1843. Cleave's int. on 350*l.* — 17*l.* 10*s.*." :—
Held sufficient evidence of payment of interest to the plaintiff to take the case out of the Statute of Limitations. *Ib.*
 4. *Willis v. Newham*, 3 Y. & J. 518, overruled. *Ib.*

See CONSPIRACY. PLEADING, 10, 11.

LOSS.

What is a total Loss.]

See INSURANCE, 1.

LUNATIC.

See HUSBAND AND WIFE, 1. PAUPER, 1, 8.

MAINTENANCE.

Validity of Order of.]

See BASTARDY. PAUPER, 1, 7, 8.

MAJORITY.

Right of to elect.]

See ELECTION, 1.

MALICIOUS PROSECUTION.

Action for.]

See COUNTY COURT, 3.

MANDAMUS.

1. *Annuity — Apportionment.*] By the 1 & 2 Will. 4, c. 11, King William the Fourth was empowered, by indenture, to grant to the queen an annuity of 100,000*l.*, to commence from the death of the king, and to be paid out of the consolidated fund. By indenture, dated the 6th of April, 1832, in pursuance of this act, the king granted to trustees in trust for her majesty the annuity of 100,000*l.*, and directed that it should be paid at the receipt of the exchequer, and that the auditor of the exchequer should issue debentures for paying the same, and that the commissioners of the treasury should cause the said sum of 100,000*l.* to be paid out of the consolidated fund. By the 4 & 5 Will. 4, c. 15, the office of auditor of the exchequer is abolished, and in all cases of grants by Parliament charged on the consolidated fund, instead of debentures being issued by the auditor, the commission-

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ers of the treasury are required to issue warrants for the payment of the moneys granted:—

Held, that a *mandamus* would lie to the lords of the treasury to issue such a warrant. *Regina v. Lords of Treasury*, 277.

2. The annuity to the queen was, by the act of Parliament and the indenture granting it, "to commence and take effect immediately after the decease of his majesty, and to continue from thenceforth for and during the natural life of her majesty, and to be paid and payable at the four most usual days of payment, viz., the 31st of March, the 30th of June, the 30th of September, and the 31st of December, by even and equal portions, the first payment to be made on such of the said days as should first and next happen after the decease of his majesty." King William the Fourth died on the 25th of June, 1837, and upon the 30th of the same month a full quarter's annuity was paid to the queen dowager. The queen dowager died on the 2d of December, 1849:—

Held, that the fact of a whole quarter's annuity having been paid on the 30th of June, 1837, would not have prevented a *mandamus* being issued to compel payment of a proportional part of the last quarter, up to the day of her death, if the annuity had been apportionable. *Ib.*

3. *Railway Company—Lands Clauses Consolidation Act—Summoning Jury for Compensation after compulsory Powers expired.*] Where within the prescribed period the promoters of a railway company gave notice to a land owner on the intended line of railway, that they required to purchase his lands, and the land owner served them with a notice to treat, and demanded that the amount of compensation should be settled by a jury, and no further steps were taken to complete the purchase until after the expiration of the period prescribed for the exercise of the powers of the company for the compulsory purchase and letting of lands:—

Held, that the company might, on the application of the land owner, notwithstanding the lapse of time, be compelled by *mandamus* to issue their warrant to the sheriff to summon a jury to assess the amount of compensation. *Birmingham, &c., Railway Co. v. Regina*, 276.

See MEETINGS. ELECTION, 1. FLOWAGE, 1.

MEETINGS.

For altering Society Rules.] The members of a benefit society whose rules have been duly confirmed according to the provisions of stat. 10 Geo. 4, c. 56, have no right to compel the secretary or other chief officer of the society to sign a notice pursuant to sect. 9, to convene a general meeting for the purpose of considering the question of altering the rules of the society, but such officers have under that section a discretionary power to give or withhold their signatures to any such notice. *Regina v. Bannatyne*, 188.

MESSENGER.

In Insolvency has no Claim against Assignee for Fees.]

See ASSIGNEE.

MINORITY.

Authority of to elect.]

See ELECTION, 1.

MINORS.

See PAUPERS, 6.

MISREPRESENTATIONS.

See PROMISSORY NOTE, 1.

MISTAKE

In Impanelling Jury.]

See NEW TRIAL, 1.

MONEY HAD AND RECEIVED.

See ASSUMPSIT.

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MUNICIPAL CORPORATION.

See ELECTION, 1. TAXES, 2.

NAMES.

Idem sonantia.]

See JURY, 2.

NECESSARIES.

See HUSBAND AND WIFE, 1.

NET CASH.

Construction of such Words.]

See CONTRACT.

NEW SOUTH WALES.

See FOREIGN LAWS.

NEW TRIAL

1. *Mistake in Jurors.*] Just before the verdict was delivered in a special jury cause, it was discovered that one of the special jurors impanelled had been summoned in another cause, and had by mistake answered to a wrong name. The defendant then objected to the verdict being received, and thereupon the learned judge offered to discharge the jury and try the cause over again. This, however, was not assented to, and the plaintiff claiming to have the verdict taken, the jury ultimately returned their verdict in favor of the plaintiff:—

Held a mis-trial; and that as the defect had been discovered and objected to before the verdict was given, the court was bound to award a *venire de novo*. *Doe d. Lord Ashburnham v. Michael*, 244.

2. *Amendment.*] The judge at the trial offered the plaintiff's counsel leave to amend, which was refused by him, owing to the strong opinion expressed by the judge that the contract was a joint contract:—

Held no ground for a new trial. *Lucas v. Beale*, 358.

3. *Contingent assessment of Damages.*] Where the jury have found a verdict for the defendant, with leave given to the plaintiff to enter a verdict for a sum at which his damages have been contingently assessed at the trial, the court will not afterwards grant a new trial in order that there may be a fresh assessment of damages, unless the plaintiff's counsel has objected to such contingent assessment at the trial. *Booth v. Clive*, 374.

4. *Variance — Amendment.*] A declaration in *assumpsit* alleged that in consideration that the plaintiff, at the request of the defendant, would make for him such a number of aerometers as the defendant should from time to time require, and deliver the same when completed, the defendant would accept the same and pay for them. Breach, by not accepting part completed, according to order, and discharging the plaintiff from continuing the making of other part, commenced to be made according to order.

It was proved that the original contract was an order to make 2000 aerometers, that 300 had been accepted, and the rest were in course of being made when the defendant discharged the plaintiff from completing them.

The judge at *nisi prius* having allowed the declaration to be amended, the court refused to grant a new trial. *Jones v. Hutchinson*, 329.

5. The parties having agreed to the terms of the amendment, and that it should be made after the trial was over on the same day, the amendment was not actually made until eight days after the trial, but in the terms agreed on, and before the following term:—

Held no ground for a new trial. *Id.*

6. The defendant's affidavits alleged that if the declaration had originally contained an allegation of an order for 2000 aerometers, he would have been prepared to show that such an order was absurd and impossible:—

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Held insufficient to show that the defendant had been prejudiced in his defence, in the absence of any allegation that 2000 aerometers had not in fact been ordered *lb.*

NOMINAL DAMAGES.

See *Set-off*.

NONSUIT.

Judgment as in Case of Nonsuit — False Statements of Defendant.] The defendant induced the plaintiff to discount his acceptance upon his representation that he was of age, and when it was presented for payment raised no objection on the ground of his infancy, but upon being sued upon it pleaded infancy. The plaintiff then made inquiries, and having satisfied himself that the plea was untrue, joined issue and gave notice of trial; but he subsequently ascertained from documents in the defendant's possession that the plea was true, whereupon he countermanded notice of trial, and took no further proceedings:—

Held, that the defendant was not entitled to judgment as in case of nonsuit. *Newton v. Farrall*, 430.

NOTICE.

1. *Before Action brought.*] The act 9 & 10 Vict. c. 95, s. 138, enacts, that in all actions to be commenced against any person for any thing done in pursuance of that act, notice in writing of such action shall be given to the defendant one month before action brought. *Booth v. Clive*, 374.
2. *To Judge of County Court.*] In the case of an action brought against the judge of one of the county courts established under that act, for disobeying a writ of prohibition, in proceeding with a matter therein referred to, such judge is entitled to notice under the above section if he proceeded honestly, believing that his duty as a judge under the act called upon him to do so. *lb.*

NUL TIEL RECORD.

See *PRACTICE*, 1.

OFFICER.

See *OVERSEER*, 1.

ORDER OF MAINTENANCE.

See *BASTARDY*.

OUTLAWRY.

Reversal of — Practice — Rule Nisi.] A rule to reverse an outlawry for error in fact, where the defendant in error has not pleaded to the assignment of error within the time allowed, is a rule to show cause only, and is not absolute in the first instance; but upon such rule being made absolute, no terms will be imposed. *Howard v. Kershaw*, 465.

OVERSEER.

1. *Not an annual Officer.*] A special overseer appointed under the 7 Will. 4, & 1 Vict. c. 81, s. 3, to make, levy, or collect borough rates in a parish lying partly within and partly without a borough, is not an annual officer, nor is he such an officer as could be appointed under the 5 & 6 Will. 4, c. 76, s. 58.
2. *Plea to an Action on Bond against.*] Therefore, where the defendants had entered into a bond as surety for W. R., and the condition of the bond recited that W. R. had been appointed to act as overseer for making, &c., borough rates within part of the parish of A., situate within a borough, during the pleasure of the council, and the bond was conditioned for the due performance of his duties by W. R. during such time as he should act as such overseer; and in an action upon the bond the defendants set out the bond and condition upon oyer, and pleaded that W. R. was duly appointed by the council to act as such overseer, subject to the pleasure of the said council, for the period of one year and no more, under and by virtue of the 7 Will. 4, & 1 Vict. c. 81, and alleged performance of the duties of the

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said office by W. R. during the period of one year for which he acted as such overseer:—

Held, (on demurrer to the replication,) that the plea was no answer to the action. *Mayor, &c., v. Wright*, 189.

OVERSEERS OF POOR.

Power to appoint a Deputy.]

See PLEADING, 13.

OWNER.

Of Vessel, liable for Smuggling.]

See SMUGGLING.

PAROL EVIDENCE.

See GUARANTY, 2.

PARTIES.

See PLEADING. ACTION, 2.

PATENT.

1. *Specification — Claims.*] A claim for a patent for improvements in the mode of doing any thing by a known process is sufficient to entitle the claimant to a patent for his improvements, when applied either to the process as known at the time of the claim, or to the same process altered and improved by discoveries subsequently published, so long as it remains the same with regard to the improvements claimed and their application. *Electric Telegraph Co. v. Brett & Little*, 347.

2. *Infringement.*] A declaration in case for the infringement of a patent, “for improvements in giving signals and sounding alarms in distant places by means of electric currents transmitted through metallic circuits,” alleged that the defendants had used “the said invention.” The specification of the patent made nine several claims in respect of different improvements. The jury having found an infringement in respect of one of such improvements, that was held to be a sufficient finding of the infringement alleged in the declaration. *Ib.*

3. *Evidence — Subsequent Discoveries.*] The title of the patent and every part of the specification in which directions were given for putting the apparatus in use, mentioned “metallic circuits” as the means by which the electric current was conveyed, but no claim was made in respect of such circuits. At the time of the patent it was not known, but it was subsequently discovered, that the earth might be used to complete the circuit to an extent of almost one half of the circuit, and that metal might be dispensed with to that extent, and the defendants had always used this new discovery:—

Held, nevertheless, that the defendants, having been found by the jury to have adopted a part of the plaintiff’s invention, the patent had been infringed. *Ib.*

4. *Verdict.*] The jury found that “the sending of signals to intermediate stations” was a new invention of the patentees, and had been adopted by the defendants. There was a distinct claim in the specification for this improvement, and the method of carrying it into effect was pointed out:—

Held, that this was the proper subject of a patent; and that the idea and method being obvious and simple did not make any difference; and that the plaintiffs were entitled to a verdict in respect of such finding, although by the defendants’ method signals were sent from, as well as to, intermediate stations. *Ib.*

5. The plaintiffs’ system was worked by six wires, but no specific claim was made to any particular number of wires or any particular system of making the signals. The defendants used only one wire, and made the signals in a different manner, by counting repeated deflections of the needle:—

Held, that a finding of the jury, “that as a whole the system of counting with one wire and two needles is not the same as the system of the plaintiffs,” did not entitle the defendants to a verdict, the plaintiffs’ claim not being to any particular system, but to the particular improvements pointed out in his specification. *Ib.*

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PAUPER.

1. *Gilbert's Act*, 22 Geo. 3.] Sect. 5 of stat. 12 & 13 Vict. c. 103, by which the costs and expenses of the order of removal and of the maintenance of a lunatic pauper removed to an asylum, who if not a lunatic would have been exempt from removal, shall be borne by the union comprising the parish wherein the lunatic pauper was resident at the time of removal, applies to unions formed under Gilbert's Act, 22 Geo. 3, c. 83. *Regina v. Priest Hutton*, 319.
2. *Removability of married Woman*.] A married woman, who had resided in the parish of L. for ten years, was removed by an order of justices. Two years before the order her husband left her and went to America. She had subsequently received letters from him, and was in daily expectation of receiving another with money for the purpose of defraying the expenses of herself and children over to America:—
Held, that she was removable, as there was no evidence that the husband intended to return to L., and that there was therefore a disruption in his residence. *Regina v. Llanelly*, 315.
3. *Residence — Interruption of, by Execution of prior Order of Removal*.] Where a valid order of removal has been *bona fide* executed by taking the pauper to the parish where he is settled, and there delivering him to the overseers, such a removal operates as an interruption of residence within the 9 & 10 Vict. c. 66, however short be the period during which the pauper was actually absent from the removing parish. *Regina v. Caldecote*, 293.
4. *Removability*.] A pauper who had resided in the parish of S. since 1835, was in 1845 removed to the parish of C. under a valid order of justices, which was unappealed against, by delivering him to the overseer of C., at his house in that parish. After this removal, but on the same day, an agreement was entered into between the officers of the two parishes, that the pauper should return to S., and be there maintained at the cost of C. The pauper accordingly returned on the same day to S., and slept there that night, and had ever since resided there. He was relieved by C. until the passing of the 9 & 10 Vict. c. 66. In 1847 an order for his removal from S. to C. was made:—
Held, that he was not irremovable. *Id.*
5. *Settlement — Serving an Office*.] A pauper had been appointed to the office of clerk of a district church, in the township of A., established under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, by the curate of such district church, and continued to act in the said office for eight years, with the knowledge of the vicar of the parish of which the district formed a part, and without any attempt having been made to remove him:—
Held, that by serving such office the pauper acquired a settlement in the township of A., under the stat. 3 W. & M. c. 11, s. 6. *Regina v. Ossell*, 307.
6. *Relief to Parent on account of Child*.] Relief given to a parent on account of his children is relief received by the children within the proviso of the 9 & 10 Vict. c. 66, s. 1.
The paupers, who were under the age of sixteen and unemancipated, had resided in the township of M. for eight years. For the first five years they resided with their mother, who was a widow, and in receipt of relief for her own and their support; for the last three years they had themselves received relief:—
Held, that they were removable from M. *Regina v. Shavington-cum-Gresty*, 298.
7. *Lunatic — Maintenance*.] By sect. 62 of stat. 8 & 9 Vict. c. 126, two justices of the county, or two justices members of the committee of visitors of the asylum, are empowered to make an order of maintenance. By sect. 84, "county" means "county of a city." *Regina v. Inhabitants of St. Maurice*, 317.
8. *Judicial Notice*.] An order for the maintenance of a lunatic purported to be made by two justices in and for the city of York:—
Held, that the court was bound to take judicial notice that the city of York was a county of a city, and therefore the order was good. *Id.*

See APPRENTICES, 3.

PAYMENT.

1. *Payment of Part after Day*.] To debt upon bond, the defendant may plead as to

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- part, payment in satisfaction *post diem* under 4 & 5 Ann. c. 16, s. 12. *Husband v. Davis*, 342.
2. *Payment to one of two Trustees.*] Payment to one of two trustees binds both. *Ib.*
3. *Made on forged Paper.*] See BILL OF EXCHANGE, 1, 2.
4. *After Action brought.*] See SET-OFF.
5. *How proved, under Statute of Limitations.*] See LIMITATIONS, 3.

PERILS OF THE SEA.

See INSURANCE, 2

PERJURY.

1. *Materiality of Averments in Indictment.*] In an indictment for perjury, it was alleged to be a material question whether or not the prisoner ever got "one Milo Williams" to write "a letter" for her; and in the averments, negating the truth of what was sworn, the indictment alleged, that, "in truth and in fact, the said Mary Ann Bennett did get the said Milo Williams, and that when on her cross examination at the trial, when the alleged perjury was committed, she was asked whether she had ever got 'a Mr. Milo Williams' (who was then pointed out to her in court) to write a letter for her:"—
- Held*, that the averments in the indictment were sufficient, without any allegation connecting the "one Milo Williams" named in the allegations of materiality, and the averments negating the truth of what was sworn, with the "Mr. Milo Williams" named in the subsequent part of the indictment. *Regina v. Bennett*, 560.
2. *Arbitrator—Power to administer Oath.*] An arbitrator, appointed by an order of a county court, under the 77th section of the stat. 9 & 10 Vict. c. 95, has no authority to administer an oath, and consequently false swearing by a party sworn before him in the course of a reference is not perjury. *Regina v. Hallett*, 570.

PERSONS UNKNOWN.

Meaning of, in Indictment.]

See EVIDENCE, 6.

PLEADING.

1. *Sufficiency of Declaration.*] Declaration stated that heretofore, to wit, &c., in consideration that the plaintiff then, through placing confidence in the defendants that they were then acting fairly by the plaintiff in then recommending the plaintiff to purchase of the defendants on their recommendation 211 pockets of hops at 63s. the cwt., the defendants promised the plaintiff that they were not then abusing the said confidence of the plaintiff, in recommending the purchase at the said price; that the plaintiff, relying on the said promise, did then, to wit, on the day and year aforesaid, through placing confidence in the defendants that they were at the time of the said promise acting fairly by the plaintiff in then recommending him to purchase at the said price, purchase of the defendants on their recommendation at the said price. The declaration then alleged that the defendants broke their said promise in this, that, at the time of making it, they were abusing the plaintiff's confidence in this, that at the time of their said recommendation the hops were worth only 50s. the cwt., as the defendants then well knew, by means whereof the plaintiff had sustained damage, &c.:—
- Held*, on motion in arrest of judgment, that the declaration disclosed a good consideration for the defendants' express promise. *West v. Jackson*, 208.
2. *Argumentativeness—Plea to Part, limiting the Claim in the Declaration.*] In an action on the *indebitatus* counts, the defendant pleaded that the debt was due for certain hops bargained and sold; that the plaintiff produced a sample at the bargain and sale, and promised to deliver the hops equal in quality and description to the sample, and that the hops were not equal in quality and description, wherefore the defendant refused to accept them, and broke his promise. On

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- special demurrer, the plea was held bad, as amounting to the general issue. *Dawson v. Collis*, 338.
3. The declaration claimed 1000*l.* for goods sold and delivered, goods bargained and sold, and on an account stated. The plea, pleaded as to 191*l.*, parcel, &c., averred that the debt to that amount was for goods bargained and sold.
Quære, whether the plea would not have been bad, on special demurrer, for attempting to limit the plaintiff in his proof as to the sum of 191*l.* *Ib.*
 4. *Time and Amount — Videlicet — Hire.*] When a contract is alleged in pleading to have been for a "certain" time or amount, it is sufficient to prove that some specific time or amount was agreed upon, and it is not necessary to prove the precise time or amount laid under a *videlicet*. *Harris v. Phillips*, 344.
 5. *Certainty.*] The declaration stated that the defendant promised to hire horses from the plaintiff, and employ them for a certain space of time, to wit, for the space of one year, and to pay the plaintiff for the use thereof certain hire and reward, to wit, 50*l.* a year for each of the horses, payable quarterly:—
Held, that the allegations after the *videlicets* were immaterial; that although it was proved that the hiring was for a week, and from week to week, at the hire of 50*l.* a year for each horse, payable weekly, there was no fatal variance; that the words "hire and reward" include time as well as amount, and therefore that the words "payable quarterly" were covered by the *videlicet* as well as the sum. *Ib.*
 6. *Sufficiency of Replication.*] In an action for injury to land, the defendants (a railway company) pleaded that they entered on the plaintiff's land under sect. 85 of the Lands Clauses Consolidation Act, before the expiration of the prescribed period for exercising their compulsory powers, and having so entered and being lawfully in possession of the land, that they, after the expiration of the prescribed period, continued in possession, and in the due and lawful exercise of the powers of the said act committed the grievances complained of. The plaintiff replied (admitting the statute) *de injuria absque residuo causæ*:—
Held, that the replication was bad, as the plea claimed an interest in land, and the replication traversed an authority in law by the denial of acting under the statute. *Worsley v. South Devon Railway Co.*, 223.
 7. *To an Action on a foreign Judgment.*] In an action upon a foreign judgment, any pleas which might have been pleaded to the original action cannot be pleaded to the action on the judgment. *Bank of Australasia v. Nias*, 252.
 8. *Of Accord and Satisfaction.*] A plea to the further maintenance of an action on the case stated that it was agreed between the plaintiffs and the defendants that the defendants should do certain things, and that the action and causes of action included in the same should be settled, satisfied, discharged, and terminated by the arrangement and agreement before mentioned. The plea then averred performance by the defendants of some of the things, and readiness and willingness to perform the others:—
Held, that the plea was bad, as it did not distinctly aver that the plaintiffs accepted the agreement in satisfaction and discharge of the causes of action. *Hall v. Flockton*, 185.
 9. *Bond — Payment of Part after Day — 4 & 5 Ann. c. 16, s. 12.*] To debt upon bond, the defendant may plead as to part payment in satisfaction *post diem* under 4 & 5 Ann. c. 16, s. 12. *Husband v. Davis*, 342.
 10. *Set-off.*] Debt. Plea, set-off alleging that the amount due from the plaintiff to the defendant equalled the plaintiff's claim. Replication, as to the plea, so far as it related to 49*l.* 16*s.* 10*d.*, parcel, &c., the Statute of Limitations, concluding with a verification, and as to the residue that the plaintiff was not nor is indebted *modo et forma*:—
Held, on special demurrer, that the replication was bad. *Mead v. Bashford*, 408.
 11. *Statute of Limitations.*] The proper replication in such case would be, that part of the set-off was barred by the Statute of Limitations, and that the plaintiff was not indebted to the defendant in any sum which (with the part so barred) equalled the amount of his demand. *Ib.*
 12. *Payment of Money into Court.*] In an action of trover for cattle, the defendant pleaded that the conversion complained of was a sale of the cattle by him after

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he had seized and impounded the same as surveyor of the highways, &c.; and that the plaintiff ought not further to maintain his action because the defendant now brings into court the sum of 10*l.* ready to be paid to the plaintiff, and that the plaintiff has not sustained damages to a greater amount, &c. :—

Held, that this plea was bad, as not warranted by the new rules. *Key v. Thimbleby*, 521.

13. *Poor Rate — Power of Overseers to appoint Deputy.*] In an action of trespass the defendants pleaded in justification that while A and four others were overseers of the township of B., and C and D church-wardens, the plaintiff was duly assessed as an inhabitant of the township in the sum of 10*s.* 4*d.* for the poor rate; that the same not being paid on demand, the plaintiff was duly summoned before two justices; that he did not appear, but that the said church-wardens and overseers appeared by the said A, and the justices, after proof of the making of the rate, &c., did, pursuant to the statute, issue their warrant, directed to the overseers of the township of B., to levy by distress upon the goods of the plaintiff the sum of 10*s.* 4*d.* and the further sum of 6*s.* for costs incurred by the said church-wardens and overseers; that the said warrant was delivered to T. B. C. as such overseer to be executed, by virtue of which warrant the defendants, as servants of the said T. B. C. as such overseer, and at his command, and for the purpose of executing such warrant, as such servants, committed the trespasses complained of. Verification.

The plaintiff replied that before execution or notice of the warrant he tendered to T. B. C. the amount of the rate :—

Held, upon demurrer, that the replication was bad for not averring a tender of the costs. *Walsh v. Southwell*, 420.

Held, also, that the plea was good, as the justices had power under the 12 & 13 Vict. c. 14, to award the costs to the parties applying for the warrant, and the overseers had a right to appoint deputies for the execution of the warrant. *Ib.*

See PROMISSORY NOTE, 1, 2. OVERSEER, 2. CALLS, 3. SEQUESTRATOR. BANKRUPTCY, 6.

PLEDGE.

Duty of Pledgee.] *Semble*, that where property is pledged to which the pledgor has no title, and which he has no right to pledge, the pledgee is bound to return it to the true owner: his undertaking, in the absence of a special contract to the contrary, being that he will return it to the pledgor, provided it turns out not to be the property of another. *Cheesman v. Excell*, 438.

POACHING.

See INDICTMENT, 3.

POLICE MAGISTRATE.

See APPRENTICE, 3.

POOR.

See PAUPER.

PRACTICE.

1. *Practice with Reference to Production of Record.*] In the case of a plaintiff giving notice to a defendant of his intention to produce the record in court, on a plea of *nul tiel* record, it is sufficient to give two days' notice. *Hopkins v. Doggett*, 322.
2. *Semble*, in the event of the plaintiff giving a defendant notice to produce it, four days should be given. *Ib.*
3. *Peremptory Undertaking — Special Jury.*] Where a rule for judgment as in case of a nonsuit has been discharged on a peremptory undertaking to try at the first sittings, the plaintiff cannot throw the trial over the sittings by getting a rule for a special jury, and having the cause marked by the marshal for a special jury. *Levy v. Moylan*, 346.
4. *Misdirection.*] In an action for flowing the plaintiff's land the defendant pleaded, first, the general issue; and, secondly, that J. J. was possessed of four closes on the bank of the stream above and of the bed of it up to the middle, that the water

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immemorially flowed over that part of the bed, and that at certain periods of the year, viz., in January, February, and March, when the water was more than sufficient for the use of the mill, the defendant, as the servant of J. J., diverted small and reasonable quantities of the water for the irrigation of those closes, which, excepting such small quantities as were absorbed and used in the irrigation, were returned into the stream above the mill, &c. The plea then averred that the diversion was not continuous, but only intermittent, and that the quantities of water absorbed and lost were very small and unappreciable, and that the diversion caused no damage or impediment to the plaintiff's mill. To this plea the plaintiff replied *de injuria*. At the trial the judge, in directing the jury on this plea, told them that he felt great difficulty in affixing a legal meaning to the term "unappreciable," but suggested that it might mean "so inconsiderable as to be incapable of value or price:" and the defendant obtained a verdict generally. The court inclined to think this interpretation of the word "unappreciable" erroneous, but considering the defendant entitled to succeed on the general issue, refused to set aside the verdict if he would consent to its being entered for the plaintiff on the special plea. *Embrey v. Owen*, 466.

5. *Certiorari to remove Order of Sessions.*] The affidavit of service of notice of an intention to apply for a *certiorari* to remove an order of sessions, under the stat. 13 Geo. 2, c. 18, s. 5, stated that the notice was served on A B and C D, two of the justices of the peace in and for the county of S., and stated that the deponent was present at the Quarter Sessions on a particular day, "and did then and there see the said A B and C D, acting as justices of the peace for the said county of S. at the said General Quarter Sessions of the Peace." The order of sessions, which purported to be made on the day to which the affidavit referred, contained in the caption the names of A B and C D, as two of the justices before whom the sessions were holden.
- The court quashed the *certiorari*, on the ground that the affidavit did not show that A B and C D were two of the justices by and before whom the order was made, and that no presumption could be drawn that they were present when the order was made from the circumstance of their names appearing in the caption. *Regina v. St. James*, 305.
6. *Certiorari to remove Indictment.*] The court will grant a *certiorari* to remove an indictment for conspiracy, on the application of one of the several defendants, without the consent of the others, if that defendant will enter into a recognizance to pay costs if either himself or any of the other defendants are convicted. *Regina v. Foulkes*, 301.
7. *Attendance of Trinity Masters.*] Application was made to the court for the attendance of Trinity masters upon the admissibility of a plea. Application refused. *The Vargas*, (AD.) 599.
8. *Depositions of Witness so ill as to be unable to travel.*] Depositions of a witness so ill as to be unable to travel are, under the 11 & 12 Vict. c. 42, s. 17, admissible in evidence before the grand jury as well as before the petty jury. *Regina v. Clements*, 578.
9. *Grand Jury.*] *Semble*, that an objection cannot be taken on the trial to the evidence on which the grand jury find a bill, as the bill is found on the oath of the grand jury. *Ib.*

See NONSUIT. EXECUTION, 1.

PRINCIPAL AND AGENT.

See ACTION, 2.

PROHIBITION.

See NOTICE.

PROMISSORY NOTE.

1. *Plea of No Consideration — Note obtained by innocent Misrepresentation of Law.*] A plea to an action on a promissory note alleging "that the note was given without consideration," and stating "that it was obtained from the defendant upon a representation by the plaintiff that a sum of money was owing from the defendant to

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the plaintiff by virtue of an indenture, whereas no such sum was owing," is a good plea of no consideration, without alleging that the representation was made "fraudulently," or that it was a representation of a matter of fact. *Southall v. Rigg*, 366.

2. *Evidence*.] Such a plea, with the addition of the word "fraudulently" in the statement of the misrepresentation, is sufficiently proved by a finding that the note was given upon the faith of an innocent misrepresentation of a matter of law by the plaintiff, and the word "fraudulently" may be rejected as surplusage. *Ib.*

QUEEN DOWAGER.

See ANNUITY.

QUO WARRANTO.

See ELECTION.

RAILWAY ACTS.

See CALLS, 1.

RAILWAY COMPANY.

1. *Compensation — Notice of taking Land — Actual Taking*.] A railway company being desirous of taking the plaintiff's land for their railway served him with a notice, pursuant to the 8 Vict. c. 18, stating that they required to purchase and take his land for the railway. The plaintiff afterwards, pursuant to the provisions of the 8 Vict. c. 18, s. 68, served the company with a notice requiring them to issue their warrant to the sheriff to summon a jury to inquire into the value of the land, claiming to be paid by way of compensation for the purchase by them of the fee simple of the land:—

Held, that as the land had not been actually taken or actually injuriously affected by the company, within the meaning of the 68th section, the plaintiff was not entitled to compensation. *Burkinshaw v. Birmingham, &c., Railway Co.*, 489.

2. *Liability for Damage by Train*.]

See TRESPASS, 1.

3. *Liability for taking Lands*.]

See LANDS CLAUSES CONSOLIDATION ACT. EJECTMENT. COVENANT, 1. ARBITRATION, 1. FLOWAGE, 1.

RATE COLLECTOR.

See OVERSEER.

RATES.

See TAXES, 2.

RECEIVING STOLEN GOODS.

Evidence — Proof of Receipt of stolen Goods from other Sources.] On an indictment for feloniously receiving goods knowing them to have been stolen, it is not competent for the prosecutor, in proof of guilty knowledge of the prisoner, to give in evidence that the prisoner, at a time previous to the receipt of the prosecutor's goods, had in his possession other goods of the same sort as those mentioned in the indictment, but belonging to a different owner, and that those goods had been stolen from such owner. *Regina v. Oddy*, 572.

REGISTRATION.

See CALLS, 3.

RELIEF.

See PAUPER, 6.

REMOVAL.

Order of.]

See PAUPER, 1, 2, 3.

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REPLEVIN.

See COSTS, 2.

REPLICATION.

See PLEADING, 10, 11.

RESIDENCE.

See AFFIDAVIT. PAUPER.

RIPARIAN PROPRIETOR.

Right of, in flowing Water.]

See EASEMENT, 2, 3.

RULES.

Of Society, meeting for Altering.]

See MEETINGS.

SALE.

See WARRANTY.

SALVAGE.

1. *Agreement — Two Sets of Salvors.]* Two agreements were made with one set of salvors, which, after being acted upon for a certain time, were each abandoned by force of circumstances.

A second set of salvors saved part of the property, but at a time when the agents of the owners had given notice that no assistance was to be given by any person not belonging to the first set of salvors.

The service was rendered in December, 1849 — the action entered in May, 1850: — *Held*, that the first set of salvors were entitled to a reward, not under the agreements, but as having contributed to the saving of the property. *The Samuel*, (A.D.) 581.

2. *Right of Master or Owner to accept or refuse Assistance.] Held, further*, That the agents had a right to refuse the assistance of all persons; but as only two of the second set of salvors were proved to have received the notice of the agents to that effect, they, with the exception of those two, were entitled to a reward. *Ib.*

3. *Delay in instituting Proceedings.]* But looking at the delay in instituting the proceedings, and the mode of conducting the suit on behalf of the second set of salvors, only 100*l.* allowed them *nomine expensarum. Ib.*

SAMPLE.

Sale by.]

See WARRANTY.

SATISFACTION.

How pleaded.]

See PLEADING, 8, 9.

SEQUESTRATOR.

Church — Charging Benefice — 13 Eliz. c. 20 — 12 & 13 Vic. c. 67.] To an action by a sequestrator of the living of S. upon a covenant to pay the yearly rent of 98*l.*, contained in a lease of the rectory and tithes (with certain exceptions) of the living of S., granted by the rector of S. to the defendant before the sequestration, the defendant pleaded, severally, that the rector being indebted to V. and M. in large sums of money, and requiring time to pay the said debts, V. and M., at the request of the rector, consented to give time, and V. consented to advance him a further sum upon condition of the said lease being granted to the defendant, and of another deed being executed by which the rector appointed the defendant receiver of all the tithes, &c., demised by the said lease, and authorizing him, after deduction of a percentage, to pay therefrom the debts of V. and M., and to keep up certain policies of insurance for the benefit of V. and M., and also certain

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other policies, and to carry out other purposes connected with the arrangement. The plea alleged that the lease was executed as part of the same transaction, and that the rector knew at the time of the deeds being executed that the defendant was attorney and agent for V., and that the second deed was made to enable him to apply the rent reserved by the first deed in the manner above mentioned; that there was due from the rector to V. and M. more than was claimed in the action, and that he, the defendant, had applied the tithes, &c., received by him, as directed by the second deed.

The defendant pleaded, eighthly, that before the execution of the lease the rector of S. was indebted to V. and M. and others, and that in consideration thereof, and of a further advance by V., the rector agreed to charge the living of S. by executing the lease declared on, and by appointing the defendant agent and receiver by the deed set out in the seventh plea; and that the lease was part of the same transaction to charge the living:—

Held, that the seventh plea did not show any defeasance of the covenant to pay the rent contained in the lease: but also, *held*, that there was an equitable assignment of the rent so far as necessary to pay V. and M., and that therefore the lease was void as being part of a transaction by which the living was charged, contrary to the provisions of the 13 Eliz. c. 20; and that both the seventh and eighth pleas were good. *Walkew v. Crofts*, 504.

SET-OFF.

Payment after Action brought—Nominal Damages.] Where the plaintiff at the trial proved a debt of 11l. 18s. 1d., and the defendant established a defence under one plea as to 18s., under a set-off as to 7l. 8s., and also a payment of 4l. after the commencement of the suit, thus affording an answer to the whole of the plaintiff's demand:—

Held, that the payment having been made after the commencement of the suit, the plaintiff was entitled to a verdict, with nominal damages, on the plea of set-off. *Spradberry v. Gillam*, 464.

See PLEADING, 10.

SETTLEMENT.

See PAUPER.

SHERIFF.

When not incompetent from Interest of Under Sheriff.]

See LANDS CLAUSES CONSOLIDATION ACT, 1.

SLANDER.

Charge of Felony—Misdirection.] A declaration in slander, after stating as inducement that the defendant intended to impute felony to the plaintiff, set out the slanderous words as follows: "I (the defendant) have a suspicion that you (the plaintiff) and B. have robbed my house, (meaning thereby that the plaintiff had feloniously stolen certain goods of the defendant,) and therefore I take you into custody:"—

Held, that the judge rightly directed the jury in stating the question to be, whether the defendant meant to impute an absolute charge of felony, or only a suspicion of felony; and that, if the jury believed the latter, the verdict ought to be for the defendant. *Tozer v. Mashford*, 451.

SMUGGLING.

Revenue—Customs Acts—Unshipping Goods.] The owner of a vessel, who knowingly lets his vessel that it may be employed in a smuggling adventure, and the cargo of which is unshipped without the duties being paid, is liable to the penalties, under the 8 & 9 Vict. c. 87, s. 46, as a person "concerned" in the illegal unshipping of the goods. *Attorney General v. Robson*, 405.

SOCIETY.

See MEETINGS.

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See PRACTICE, 3. NEW TRIAL, 1.

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STOCKHOLDERS.

Individual Liability of:]

See FOREIGN JUDGMENT.

SURPLUSAGE.

See PROMISSORY NOTE, 2.

SUSPICION.

Of Felony.]

See SLANDER.

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SWANSEA CANAL COMPANY.

See EJECTMENT, 2.

TAXATION.

Costs of, Party liable for.

See COSTS, 6.

TAX COLLECTOR.

See OVERSEER, 1.

TAXES.

1. A notice of claim, made under sect. 17 of the 5 & 6 Will. 4, c. 76, to be inserted on the burgess roll of a municipal corporation, must state the parish in which the property is situated in respect of which the claim is made. *Regina v. Mayor of Kidderminster*, 248.
2. By a local act of the borough of K., owners of dwelling-houses within the borough of a less yearly rent than 10*l.* were to be rated to the poor instead of the occupiers. The overseers were, by sect. 2, empowered to compound with the owners at one third the rate where the "annual rent and value" did not amount to 7*l.*, and at one half the rate where the annual rent or value amounted to 7*l.* but did not amount to 10*l.* Sect. 15 provided that nothing in the act was to prejudice or affect any municipal or parochial franchises of the occupiers, but that they might claim to be put on the burgess roll as if that act had not passed, and the occupiers had been rated and assessed to the poor in their own names. M. claimed to be put on the burgess roll of the borough of K. in respect of a house which he occupied as tenant at a yearly rent of 7*l.* The house was stated in the poor rate to be of the gross estimated value of 6*l.* 10*s.*, and of the ratable value of 5*l.* 4*s.* His landlord had compounded with the overseers at one third the poor rate, and had duly paid his composition. The borough rates of K. were paid out of the poor rates:—
Held, that under the local act the criterion for composition was the rent which could fairly be obtained when the premises were let, or the value for which they could be let when they were vacant; but that the title of the occupier to be put upon the burgess roll would not be affected by any mistake in the amount of the composition between the owner and overseers; that the overseers were entitled to include the borough rate in the composition as part of the poor rate; and that payment of the composition was equivalent to the payment of the borough rate. *Ib.*

TRESPASS.

1. *Railway Company — Liability for Damage.*] A railway train driven at the rate of forty miles an hour, according to the general directions of the railway company to the driver, ran over and killed some sheep which had strayed on the line in consequence of the defective fences of the company:—
Held, that the train being under the direction and control of a rational agent, the company were not liable in *trespass* for the injury; but that the proper form of action was by action on the *case*, either for permitting the fences to be out of repair, or for directing the servant to drive at such a rate as to interfere with the right of the sheep to be on the line of railway. *Sharrod v. London, &c., Railway Co.*, 401.
2. By sect. 1 of 11 & 12 Vict. c. 44, "Every action to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction, shall be an action on the *case*." By sect. 7 of 53 Geo. 3, c. 127, two justices are empowered, "by order under their hands and seals," to direct the payment of money, due for church rates, with costs; and upon refusal of parties "to pay according to such order," by warrant under hand and seal to levy the rate and costs by distress. By sect. 14 of 11 & 12 Vict. c. 43, it is enacted, "That if justices convict or make an order against a defendant, a minute thereof shall be then made, and the conviction or order shall be afterwards drawn up in proper form, under their hands and seals." By sect. 17, "In all cases whereby any act of authority is given to levy any sum upon any person's goods by distress for not obeying any order of justices, the defendant shall be served with a minute of such order before any warrant of distress shall issue in that behalf."

The plaintiff having been rated to a church rate and refused to pay, a complaint was made before justices, and duly heard, and on the 6th of May a verbal order was made for payment by the plaintiff of the amount of the rate and costs. This order was not formally drawn up till some days afterwards. On the 7th a minute of the order was served upon the plaintiff, who refused to pay. After such refusal the order was formally drawn up, dated the 6th of May, and a warrant issued by the defendants, dated the same day, which was not executed until October, when a cart of the plaintiff was seized for the distress. It did not appear whether the warrant was drawn up before or after the order dated the 6th of May, nor did it recite the order.

The plaintiff having brought trespass for the seizure :—

Held, that it was not necessary before issuing the warrant that an order should have been formally drawn up under hand and seal, but that the pronouncing of the order on the 6th and the service of the minute of the order on the 7th were sufficient to justify the issuing of the warrant; and that the non-recital of the order in the warrant, and the fact of the date of the warrant being the same as that of the order, and the neglect to show in the warrant that it had issued subsequently to the disobedience of the order, being all only matters of form, the defendants were entitled to the protection of sect. 1 of 11 & 12 Vict. c. 44. *Ratt v. Parkinson*, 332.

3. *Sebble*, (*per Jervis, C. J.*), the words "exceeding his jurisdiction," in sect. 2 of 11 & 12 Vict. c. 44, mean doing something which the justice could by no possibility have a legal right to do. *Ib.*

4. *Jurisdiction of County Court.*]

See COUNTY COURT, 5.

5. *Waiver of Trespass.*]

See ASSUMPSIT.

TROVER.

1. *Officer's Liability.*] A fiat issued against the plaintiff, on the 20th of July, 1849, upon a debt due from a banking company, in which he was a member, to G., the petitioning creditor, without any judgment having been obtained against the public officer, and a warrant of seizure in the ordinary form was issued to F., the messenger, dated the 30th of July. The creditors' assignee was appointed August 21. The 12 & 13 Vict. c. 106, came into operation October 11, and on the 18th of October a seizure of the plaintiff's goods was made by the messenger F. under the said warrant:—

Held, that the fiat was invalid, and that either the petitioning creditor or the messenger was liable in trover for the wrongful seizure, but the court declined to determine which of the two was liable, as it was not required by the case submitted for their opinion. *Darison v. Farmer*, 391.

2. *Deposit of Goods — Right of true Owner to recover.*] Judgment having been obtained against the plaintiff in 1844, he executed a bill of sale of his plate to M. to defeat the execution. M. afterwards took an assignment of the judgment, and in 1848 issued an execution against the plaintiff and seized his goods, whereupon the latter, for the purpose of defeating the execution of M., deposited the plate with the defendant:—

Held, in an action of trover for the plate, that the defendant was entitled to set up the right of M. to it. *Cheesman v. Excell*, 438.

3. *Deed — Estoppel.*] The plaintiff and the defendant had been in partnership together, as paper makers and iron merchants, and in the deed of dissolution it was recited that an agreement had been made that the defendant should have all the stock in trade in the business of paper makers, but the plaintiff should receive paper out of that stock to the value of £898*l.* 4*s.* 11*d.* which was to remain in the paper mill for a year, and that the plaintiff was to have all the stock in trade in the iron business. The deed also recited, that in pursuance of that arrangement paper of that value had been delivered to the plaintiff, and the same then was in the paper mill as the plaintiff acknowledged; and then followed an assignment by the defendant to the plaintiff of all the stock in trade in the iron business, and by the plaintiff to the defendant of all the stock in trade in the paper-making business, "except the £898*l.* 4*s.* 11*d.* worth of paper so delivered to the plaintiff as aforesaid."

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No actual delivery or separation of this portion of the paper took place; but there was evidence of a conversion of the whole by the defendant:—

Held, that the defendant was estopped from saying that there was no delivery to the plaintiff; and that, there having been a conversion of the whole, the deed showed that the plaintiff had sufficient possession to support an action of trover. *Wiles v. Woodward*, 510.

See PLEADING, 12.

TRUSTEES.

Payment to.] Payment to one of two trustees binds both. *Husband v. Davis*, 342.

USURY.

1. *Policy of Assurance — Bonus.*] Sir J. O., being much indebted, conveyed by indenture to trustees all his life interest in an estate, in trust, without the necessity of his consent, to convey the same to certain creditors. By another indenture of the 1st of July, 1823, between the trustees, Sir J. O., and the creditors, it was agreed that the trustees should hold the rents to pay annuities, and to divide the rents into two shares proportionate to the amount of the debts specified in two schedules to the deed, the portion appropriated to the first schedule to be paid to the creditors specified in that schedule equally in discharge of their debts, and after satisfying the debts and interest as to the shares appropriated to such creditors, to apply a competent sum in effecting and keeping on foot policies on the life of Sir J. O.; provided that any addition by way of bonus to the sums assured should belong to the creditors in the second schedule in addition to their debts, and be divided in proportion to their debts, notwithstanding that the principal and interest thereon might be discharged; and in consideration thereof, all the creditors gave to Sir J. O. leave to live any where without molestation to his person or goods by them, provided that, if any creditor should molest him, his debt should be considered as released, and that Sir J. O. might plead such release in bar to any action. The trustees accordingly effected assurances, and after the death of Sir J. O. received the sum assured and also a bonus, the whole of which was claimed by Lady O., the widow, on the ground of the transaction having been usurious as to the creditors in the second schedule:—

Held, first, that the indenture of the 1st of July was not void for usury as to the provisions for the creditors in the first schedule. *O'Brien v. Kenyon*, 431.

2. *Held*, secondly, that the indenture was not void for usury as to the provision for creditors in the second schedule, nor was it in any respect void for usury. *Ib.*

3. *Forbearance.*] *Semble*, that the license to Sir J. O. was not a forbearing of the debt within the meaning of the 12 Ann. stat. 2, c. 16, but was a relinquishment of his personal liability.

4. *Action at Law.*] *Held*, also, that no action at law would lie at the suit of Lady O., against the trustees, to recover either the balance unapplied or the sums received from the insurance office; nor would such action lie even if the transaction were usurious as to the creditors in the second schedule. *Ib.*

VARIANCE.

Plaintiffs wrote to defendant, "We are doing business with B., and require a guaranty to the amount of 200*l.*, and they refer us to you." Defendant wrote in answer, "I have no objection to become security for B., and subjoin a memorandum to that effect." The memorandum subjoined was, "I hereby engage to guaranty to Messrs. Colbourn, iron masters, 200*l.* for iron received from them for B., as annexed:—"

The declaration alleged, that in consideration that the plaintiffs, at the request of the defendant, would deliver certain iron to B. on credit, the defendant promised to guaranty to the plaintiffs the price of the said iron to the amount of 200*l.*:—

Held, that there was no variance; that the promise was to be looked at apart from the consideration; that, assuming the guaranty to contain a promise to guaranty to the plaintiffs the price of iron supplied, it also contained a promise to guaranty the price of iron to be supplied, and that the plaintiff was not bound to state the whole of the promise, but only the part for the breach of which he sued. *Colbourn v. Dawson*, 378.

See LARCENY, 2. EVIDENCE, 6. NEW TRIAL.

Common Law, Admiralty, &c.

The plaintiff having been rated to a church rate and refused to pay, a complaint was made before justices, and duly heard, and on the 6th of May a verbal order was made for payment by the plaintiff of the amount of the rate and costs. This order was not formally drawn up till some days afterwards. On the 7th a minute of the order was served upon the plaintiff, who refused to pay. After such refusal the order was formally drawn up, dated the 6th of May, and a warrant issued by the defendants, dated the same day, which was not executed until October, when a cart of the plaintiff was seized for the distress. It did not appear whether the warrant was drawn up before or after the order dated the 6th of May, nor did it recite the order.

The plaintiff having brought trespass for the seizure :—

Held, that it was not necessary before issuing the warrant that an order should have been formally drawn up under hand and seal, but that the pronouncing of the order on the 6th and the service of the minute of the order on the 7th were sufficient to justify the issuing of the warrant; and that the non-recital of the order in the warrant, and the fact of the date of the warrant being the same as that of the order, and the neglect to show in the warrant that it had issued subsequently to the disobedience of the order, being all only matters of form, the defendants were entitled to the protection of sect. 1 of 11 & 12 Vict. c. 44. *Ratt v. Parkinson*, 332.

3. *Seemle*, (*per Jervis, C. J.*), the words “exceeding his jurisdiction,” in sect. 2 of 11 & 12 Vict. c. 44, mean doing something which the justice could by no possibility have a legal right to do. *Ib.*

4. *Jurisdiction of County Court.*]

See COUNTY COURT, 5.

5. *Waiver of Trespass.*]

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TROVER.

1. *Officer's Liability.*] A fiat issued against the plaintiff, on the 20th of July, 1849, upon a debt due from a banking company, in which he was a member, to G., the petitioning creditor, without any judgment having been obtained against the public officer, and a warrant of seizure in the ordinary form was issued to F., the messenger, dated the 30th of July. The creditors' assignee was appointed August 21. The 12 & 13 Vict. c. 106, came into operation October 11, and on the 18th of October a seizure of the plaintiff's goods was made by the messenger F. under the said warrant :—

Held, that the fiat was invalid, and that either the petitioning creditor or the messenger was liable in trover for the wrongful seizure, but the court declined to determine which of the two was liable, as it was not required by the case submitted for their opinion. *Davison v. Farmer*, 391.

2. *Deposit of Goods — Right of true Owner to recover.*] Judgment having been obtained against the plaintiff in 1844, he executed a bill of sale of his plate to M. to defeat the execution. M. afterwards took an assignment of the judgment, and in 1848 issued an execution against the plaintiff and seized his goods, whereupon the latter, for the purpose of defeating the execution of M., deposited the plate with the defendant :—

Held, in an action of trover for the plate, that the defendant was entitled to set up the right of M. to it. *Cheesman v. Excell*, 438.

3. *Deed — Estoppel.*] The plaintiff and the defendant had been in partnership together, as paper makers and iron merchants, and in the deed of dissolution it was recited that an agreement had been made that the defendant should have all the stock in trade in the business of paper makers, but the plaintiff should receive paper out of that stock to the value of 898*l.* 4*s.* 11*d.* which was to remain in the paper mill for a year, and that the plaintiff was to have all the stock in trade in the iron business. The deed also recited, that in pursuance of that arrangement paper of that value had been delivered to the plaintiff, and the same then was in the paper mill as the plaintiff acknowledged; and then followed an assignment by the defendant to the plaintiff of all the stock in trade in the iron business, and by the plaintiff to the defendant of all the stock in trade in the paper-making business, “except the 898*l.* 4*s.* 11*d.* worth of paper so delivered to the plaintiff as aforesaid.”

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No actual delivery or separation of this portion of the paper took place; but there was evidence of a conversion of the whole by the defendant:—

Held, that the defendant was estopped from saying that there was no delivery to the plaintiff; and that, there having been a conversion of the whole, the deed showed that the plaintiff had sufficient possession to support an action of trover. *Wiles v. Woodward*, 510.

See PLEADING, 12.

TRUSTEES.

Payment to.] Payment to one of two trustees binds both. *Husband v. Davis*, 342.

USURY.

1. *Policy of Assurance — Bonus.*] Sir J. O., being much indebted, conveyed by indenture to trustees all his life interest in an estate, in trust, without the necessity of his consent, to convey the same to certain creditors. By another indenture of the 1st of July, 1823, between the trustees, Sir J. O., and the creditors, it was agreed that the trustees should hold the rents to pay annuities, and to divide the rents into two shares proportionate to the amount of the debts specified in two schedules to the deed, the portion appropriated to the first schedule to be paid to the creditors specified in that schedule equally in discharge of their debts, and after satisfying the debts and interest as to the shares appropriated to such creditors, to apply a competent sum in effecting and keeping on foot policies on the life of Sir J. O.; provided that any addition by way of bonus to the sums assured should belong to the creditors in the second schedule in addition to their debts, and be divided in proportion to their debts, notwithstanding that the principal and interest thereon might be discharged; and in consideration thereof, all the creditors gave to Sir J. O. leave to live any where without molestation to his person or goods by them, provided that, if any creditor should molest him, his debt should be considered as released, and that Sir J. O. might plead such release in bar to any action. The trustees accordingly effected assurances, and after the death of Sir J. O. received the sum assured and also a bonus, the whole of which was claimed by Lady O., the widow, on the ground of the transaction having been usurious as to the creditors in the second schedule:—

Held, first, that the indenture of the 1st of July was not void for usury as to the provisions for the creditors in the first schedule. *O'Brien v. Kenyon*, 431.

2. *Held*, secondly, that the indenture was not void for usury as to the provision for creditors in the second schedule, nor was it in any respect void for usury. *Ib.*

3. *Forbearance.*] *Seemle*, that the license to Sir J. O. was not a forbearing of the debt within the meaning of the 12 Ann. stat. 2, c. 16, but was a relinquishment of his personal liability.

4. *Action at Law.*] *Held*, also, that no action at law would lie at the suit of Lady O., against the trustees, to recover either the balance unapplied or the sums received from the insurance office; nor would such action lie even if the transaction were usurious as to the creditors in the second schedule. *Ib.*

VARIANCE.

Plaintiffs wrote to defendant, "We are doing business with B., and require a guaranty to the amount of 200*l.*, and they refer us to you." Defendant wrote in answer, "I have no objection to become security for B., and subjoin a memorandum to that effect." The memorandum subjoined was, "I hereby engage to guaranty to Messrs. Colbourn, iron masters, 200*l.* for iron received from them for B., as annexed:—

The declaration alleged, that in consideration that the plaintiffs, at the request of the defendant, would deliver certain iron to B. on credit, the defendant promised to guaranty to the plaintiffs the price of the said iron to the amount of 200*l.*:—

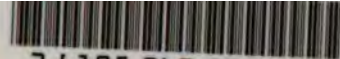
Held, that there was no variance; that the promise was to be looked at apart from the consideration; that, assuming the guaranty to contain a promise to guaranty to the plaintiffs the price of iron supplied, it also contained a promise to guaranty the price of iron to be supplied, and that the plaintiff was not bound to state the whole of the promise, but only the part for the breach of which he sued. *Colbourn v. Dawson*, 378.

See LARCENY, 2. EVIDENCE, 6. NEW TRIAL.









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